Petition

81-574

No. ——

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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether in employment discrimination cases a person who is employed by the defendant, who was never rejected for employment by the defendant, and who alleged that he had been discriminated against solely with regard to promotions and not by means of any procedures used by the defendant in hiring may bring suit under rule 23 of the Federal Rules of Civil Procedure on behalf of a class of persons who were allegedly discriminated against solely with regard to hiring.

PARTIES

General Telephone Company of the Southwest *

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* General Telephone Company of the Southwest has no subsidiaries. The parent company of General Telephone Company of the Southwest is General Telephone and Electronics Corporation. The following list consists of the significant subsidiaries of the parent company, as defined by the Securities and Exchange Commission, including those that have outstanding publicly held issues of securities in the United States:

GTE Products Corporation of Connecticut; GTE Products Corporation; GTE Automatic Electric Incorporated; GTE Automatic Electric Laboratories Incorporated; GTE Lenkurt Incorporated; GTE Credit Corporation; GTE Finance N.V.; GTE Laboratories Incorporated; GTE International Incorporated; GTE Telecommunicazioni S.P.A.; GTE Telenet Incorporated; GTE Telenet Holding Corporation; GTE Telenet Communications Corporation; GTE Telenet Information Services Incorporated; GTE Telenet Systems Incorporated; Anglo-Canadian Telephone Company; British Columbia Telephone Company; AEL Microtel Limited; Canadian Telephones and Supplies Ltd.; Dominion Directory Company Limited; Quebec-Telephone; General Telephone Company of California; General Telephone Company of Florida; General Telephone Company of Illinois; General Telephone Company of Indiana, Inc.; General Telephone Company of Kentucky; General Telephone Com-

Mariano S. Falcon

All Mexican-Americans who were employed by or who sought employment with General Telephone Company of the Southwest at its Irving, Texas location.

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pany of Michigan; General Telephone Company of the Midwest; General Telephone Company of the Northwest, Inc.; General Telephone Company of Ohio; General Telephone Company of Pennsylvania; General Telephone Company of the Southeast; General Telephone Company of Wisconsin; GTE Directories Corporation; Hawaiian Telephone Company; GTE Data Services Incorporated; GTE Investment Management Corporation; GTE Realty Corporation; GTE Satellite Corporation; GTE Service Corporation; GTE Shareholder Services Incorporated; Telect Insurance Company Limited.

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No.

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MARIANO S. FALCON,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

General Telephone Company of the Southwest petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment and findings of fact and conclusions of law by the District Court concerning liability were not reported. *See* Appendix at 34a, 46a. The orders of the district court certifying the class and denying motions for decertification of the class also were not reported. *See* Appendix at 48a through 52a. The opinion of the District Court with respect to back pay was reported at 463 F. Supp. 315 (N.D. Tex. 1978). *See* Appendix at 53a. The initial opinion of the United States Court of Appeals for the Fifth Circuit was reported at 626 F.2d 369 (5th Cir. 1980). *See* Appendix at 4a. The opinion of this Court granting certiorari, vacating the decision of the Court of Appeals, and remanding the case to the

Court of Appeals for further consideration was reported at 101 S. Ct. 1752 (1981). The opinion of the Court of Appeals vacating portions of its prior decision and reinstating others was unofficially reported at 25 Fair Empl. Prac. Dec. 1735 (5th Cir. 1981). *See* Appendix at 1a, 2a.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 29, 1981. *See* Appendix at 1a. A timely Petition for Rehearing was denied on June 23, 1981. *See* Appendix at 70a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process clause of amendment V of the United States Constitution and rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure are set out in the Appendix at 71a.

STATEMENT

Mariano S. Falcon ("Falcon") applied to and was hired by the Irving, Texas division of General Telephone Company of the Southwest ("General") in July 1969. During 1971 and 1972, he sought and was considered for a promotion to Field Inspector, a management position. He did not receive this promotion, although several non-Mexican-Americans were promoted. He subsequently filed a complaint alleging that General's failure to promote him was the result of General's discriminatory policy toward Mexican-Americans and violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—2000e-17 and 42 U.S.C. § 1981.[1] Falcon did not allege in the complaint

[1] Jurisdiction of the district court was premised on 28 U.S.C. §§ 1343(4), 2201 & 2202 (1976 & Supp. III 1979) and 42 U.S.C. § 2000e-5(f) (1976).

(nor at any time during these proceedings) that General discriminated against him with respect to hiring.[2]

The complaint also stated that Falcon was bringing suit pursuant to rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of all Mexican-Americans who are or might be employed by General at its Irving location. The complaint alleged that General had discriminated against these persons because of their national origin with regard to compensation, terms, conditions, and privileges of employment.

Prior to trial Falcon requested that the trial court certify a class, with Falcon as its sole representative, consisting not only of all Mexican-Americans employed by General but also of all Mexican-Americans who had applied for employment with General. Falcon did not introduce any evidence showing that he could meet the prerequisites to a class action of rule 23(a) of the Federal Rules of Civil Procedure with regard to these unsuccessful applicants. Instead, Falcon argued that no such evidence was necessary because under the Fifth Circuit's "across the board" theory of employment discrimination class actions, if a plaintiff shows himself to be a member of a minority group and an employee of the defendant, he may represent all other minority employees or applicants for employment with the defendant, even if the types of discrimination allegedly suffered by members of the proposed class differ (*e.g.*, discrimination in hiring versus discrimination in promotions). (Fifth Cir. App. at 49-52.) The trial court certified a class under rule 23(b)(2) that included unsuccessful applicants with Falcon as its sole representative, without holding an evidentiary hearing to determine whether the pre-

[2] Falcon's EEOC charge likewise did not mention hiring discrimination. Moreover, he testified that he did not even know any Mexican-Americans who had unsuccessfully applied for employment with General. Trial Transcript at 125.

requisites of rule 23(a) were satisfied and without making findings of fact to support its conclusion that Falcon was an appropriate representative of the class. (Fifth Cir. App. at 52.)

General objected that Falcon could not meet the requirements of rule 23(a) with regard to the proposed representation of unsuccessful applicants because he had concededly not himself suffered from hiring discrimination and because of the appearance of impropriety arising from the fact that his interests were potentially different from those of this segment of the class. (Fifth Cir. App. at 101-07, 114, 321-24.) Falcon responded that under the across the board approach to employment discrimination class actions it was irrelevant that he had not suffered from hiring discrimination and that the courts in employment discrimination cases "have not recognized the appearance of impropriety where an employee seeks to represent the interests of a prospective employee." (Fifth Cir. App. at 149-52.) The trial court denied all attempts by General to have the class decertified.

The district court bifurcated the trial into liability and remedy stages. At the liability stage, the plaintiff introduced extensive live testimony and documentary evidence concerning his allegations of discrimination in promotions. The sole evidence introduced by Falcon pertaining to hiring discrimination, however, consisted of statistical exhibits comparing the percentage of Mexican-Americans in the total work force of the surrounding area to the percentage of Mexican-Americans in General's work force at its Irving location and statistical exhibits showing a breakdown by race and national origin of the numbers of persons hired by General during certain years. No live testimony concerning the alleged hiring discrimination was introduced by plaintiffs, nor did plaintiffs attempt any comparisons between the number of Mexican-Americans hired by General and

the percentage of Mexican-Americans in the relevant applicant pool.

The trial court ruled that General had discriminated against Falcon by not promoting him and had discriminated against the class with respect to hiring, but not with respect to promotions. The trial court filed findings of fact and conclusions of law and ordered certain injunctive relief at that time. At the remedy portion of the trial, the court ordered General to pay back wages to Falcon and to certain members of the class.

On appeal, the Fifth Circuit affirmed the trial court's decision certifying Falcon as the representative of a class including unsuccessful applicants, holding that under the Fifth Circuit's rule permitting "across the board" attacks on employment discrimination the rule 23(a) prerequisites are satisfied even where an employee complaining of one employment practice seeks to represent persons complaining of different practices.[3] The court of appeals also affirmed the trial court's ruling that General's failure to promote Falcon was discriminatory, holding that General had failed to "prove," in rebuttal to Falcon's prima facie case, that those non-Mexican-Americans promoted after Falcon sought a promotion were "better qualified" than Falcon. Because the district court failed to explain why it had relied upon statistical hiring data

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[3] The court of appeals stated that Falcon had shown more in common with the class than simply discrimination on the basis of national origin. "He also showed a similarity of interests based on job location, job function and other considerations." Although the trial court did limit the class represented by Falcon to the Irving location, it did not limit the class represented by Falcon to any particular job or type of jobs—he was allowed to represent *all* employees at Irving and applicants for *all* of the jobs at Irving. These jobs differed considerably, ranging in content from the construction job held by Falcon to, for example, clerical and administrative positions. The court of appeals did not specify what "other considerations" it thought relevant.

without reference to General's evidence concerning applicant flow, the court of appeals did not affirm the district court's decision that General had discriminated against the class with regard to hiring but instead remanded this portion of the case for a reevaluation of the statistical data introduced by the parties.

General filed a petition in this Court for a writ of certiorari to review the order of the Fifth Circuit remanding the case to the district court. The petition for certiorari raised two separate issues: (1) whether a current employee (such as Falcon) who does not allege that he has been discriminated against with respect to hiring may nevertheless bring suit under rule 23 of the Federal Rules of Civil Procedure on behalf of a class of persons who were allegedly discriminated against solely with regard to hiring, and (2) whether, in order to rebut the plaintiff's prima facie case in employment discrimination cases based on a disparate treatment theory, the defendant must prove by a preponderance of the evidence that those promoted instead of the plaintiff were better qualified than the plaintiff.

While General's petition for a writ of certiorari was pending, this Court handed down its decision in *Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981), holding that in employment discrimination cases involving allegations of disparate treatment, the defendant may carry its burden of rebutting the prima facie case by producing some evidence that the plaintiff was rejected and someone else was preferred for a non-discriminatory reason. *Burdine* did not address any issues relating to the proper scope of a class in employment discrimination class actions. This Court subsequently granted General's petition for a writ of certiorari, vacated the judgment of the Fifth Circuit remanding the case to the district court, and remanded the case to the Fifth Circuit for further consideration in light of *Burdine*. 101 S. Ct. 1752 (April 6, 1981).

On remand, the Fifth Circuit vacated only the portion of its prior opinion that specifically dealt with the promotion claims of Falcon, the named plaintiff. The court expressly reinstated all other parts of its prior opinion, including part I, where it had affirmed the district court's class certification on the basis of the across the board theory. Thus, upon remand, the district court would have only two limited tasks: (1) a reevaluation of Falcon's individual claim of discrimination in promotions under the standards specified by this Court in *Burdine* and (2) a reevaluation of the statistical evidence pertaining to the hiring claims of the class. By reinstating part I of its prior opinion, the Fifth Circuit effectively precluded any reconsideration by the district court of its utilization of the across the board theory in certification of Falcon as sole representative of a class of applicants.

REASONS FOR GRANTING THE WRIT

I. The Holding by the Court of Appeals That a Current Employee May Represent Unsuccessful Applicants Conflicts with the Decisions of This Court in *East Texas Motor Freight* and *General Telephone Co. of the Northwest* and with the Decisions of Other Courts of Appeals

Rule 23(a) of the Federal Rules of Civil Procedure establishes four prerequisites to the maintenance of a class action: numerosity, commonality, typicality, and adequacy of representation. The Fifth Circuit has long adhered to the so-called "across the board" theory in employment discrimination class actions to determine whether the commonality, typicality, and adequacy of representation requirements are satisfied. Under this approach, the allegation of the named plaintiff that the employer discriminates against persons in the same protected group as the plaintiff is generally sufficient to meet the commonality, typicality, and adequacy requirements of rule 23(a) and to permit a plaintiff complaining of one type of employment discrimination (*e.g.*,

terminations) to represent persons complaining of other types of discrimination (*e.g.*, hiring).[4] The original rationale for this special approach to rule 23(a) in employment discrimination actions was that the question whether a racially discriminatory policy exists is a question of fact common to all members of the class and that this single common question satisfies not only the commonality requirement of rule 23(a) but also the typicality and adequacy requirements. *See Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969).

This Court's decision in *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977), precludes the continued use of the across the board approach to class actions. There the Court explained that although common questions of law or fact are frequently present in suits alleging discrimination, the inquiry of the trial court may not end with this single conclusion: "[C]areful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought

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[4] *See, e.g.*, Long v. Sapp, 502 F.2d 34, 42-43 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-25 (5th Cir. 1969). *Cf.* Alexander v. Gino's, Inc., 621 F.2d 71, 75 (3d Cir.), *cert. denied*, 449 U.S. 953 (1980) ("The essence of [the across the board] theory is that the named plaintiff may challenge conduct affecting the class even if he himself has not been affected by the conduct . . . . In effect, it loosens the typicality and adequate representation requirements of rule 23(a)(3) and (a)(4)."); Wajda v. Pennsylvania Mut. Life Ins. Co., 80 F.R.D. 303, 307 (E.D. Pa. 1978) (across the board approach "amounts to a judicial relaxation of the Rule 23(a)(2) and (3) requirements of commonality and typicality in Title VII cases"); Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688, 711 (1980) ("failure to define the class by reference to the named plaintiff's individual claim is characteristic of the 'across-the-board' approach to Title VII class actions"; "a conclusory allegation of classwide discrimination is sufficient for certification").

the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." *Id.* at 406-07.

This language in *East Texas Motor Freight* has led many courts to reject any further reliance on the across the board theory and to begin to examine employment discrimination suits on a case by case basis to determine whether the rule 23(a) prerequisites are met.[5] As the court below observed, however, the Fifth Circuit has not read *East Texas Motor Freight* to preclude use of the across the board theory in employment discrimination class actions. Instead, the Fifth Circuit has in such cases limited *East Texas Motor Freight* to its precise facts—where the class representatives were not discriminated against at all.[6] *See Satterwhite v. City of Greenville*, 578 F.2d 987, 993 n.8 (5th Cir. 1978) (en banc), *vacated and remanded on other grounds*, 445 U.S. 940 (1980). In so doing, the Fifth Circuit ignored the language quoted above from the *East Texas Motor Freight* case that was clearly of broader applicability.

The Fifth Circuit's continued adherence to the across the board approach in the present case[7] was not merely

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[5] *See, e.g.*, Patterson v. General Motors Corp., 631 F.2d 476, 480 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1988 (1981); Abron v. Black & Decker (U.S.) Inc., 26 Fair Empl. Prac. Cas. 369 (4th Cir. July 17, 1981); Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273-76 (4th Cir. 1980); Hill v. Western Elec. Co., 596 F.2d 99, 101-02 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); Golden v. Local 55, Int'l Ass'n of Firefighters, 633 F.2d 817, 824 (9th Cir. 1980). *See generally* Rutherglen, *supra* note 4, at 721-23. The Tenth Circuit had rejected the across the board approach prior to this Court's decision in *East Texas Motor Freight*. *See* Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270-71 (10th Cir. 1975).

[6] The Fifth Circuit has not, however, limited *East Texas Motor Freight* to its precise facts in class actions that do not involve allegations of employment discrimination. *See* Johnson v. American Credit Co., 581 F.2d 526, 532-33 (5th Cir. 1978) (Wisdom, J.).

[7] And in the subsequent case of Phillips v. Joint Legislative Committee on Performance & Expenditure Review, 637 F.2d 1014, 1024 (5th Cir. 1981).

abstract error. Any review of the particular facts presented would have required the conclusion that certification of Falcon as the representative of rejected applicants was inappropriate because his claims were not typical of the claims of the class and because he was not an adequate representative of the class.[8]

A. *The Fifth Circuit's Holding That the Claims of a Current Employee Are Typical of the Claim of Unsuccessful Applicants Is Inconsistent with the Approach of This Court in* East Texas Motor Freight *and* General Telephone Co. of the Northwest *and Conflicts with the Decisions of Several Other Courts of Appeals*

In *East Texas Motor Freight*, this Court stressed that the class representative must be a member of the class and must "possess the same interest and suffer the same

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[8] As this court noted in *East Texas Motor Freight, supra*, 431 U.S. at 406 n.12, no remand for trial of class claims is appropriate unless "the initial certification [of the class] was proper and decertification not appropriate." Since the initial certification of the class in this case and the subsequent refusals by the trial court to decertify the class were erroneous, the class must now be decertified and the remand of the class claims ordered by the Fifth Circuit vacated. United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), is not to the contrary. There the Court held that a person claiming to represent a class is not deprived of standing under article III to litigate the issue of class certification simply because the purported class representative's individual claims are mooted after suit is filed. *Geraghty* differs from the present case in two fundamental respects. First, in *Geraghty* the individual plaintiff clearly had been a member of the class he sought to represent at the time suit was filed. Here, Falcon has never been a member of a class of persons allegedly discriminated against with respect to hiring. Second, *Geraghty* was limited to considerations of article III standing and the Court expressly noted that the mere fact that the plaintiff there had standing did not automatically establish that the plaintiff was an adequate class representative under rule 23(a). *See id.* at 405-07 (quoting Sosna v. Iowa, 419 U.S. 393, 403 (1975)).

injury" as the class members. 431 U.S. at 403 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). More recently, this Court noted that the typicality requirement of rule 23(a) "is said to limit the class claims to those fairly encompassed by the named plaintiff's claims." *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980). These rulings clearly require that there be an inquiry into whether the named plaintiff's claims are typical of those of the putative class—an inquiry that the Fifth Circuit held that the trial court was not required to conduct in this case. Instead, by a mechanical application of the across the board approach, the Fifth Circuit concluded that *all* requirements of rule 23(a), including the typicality requirement, were satisfied.

Other courts of appeals have inquired into the existence of typicality in similar cases. They have concluded—contrary to the decision below—that current employees' claims generally are *not* typical of the claims of rejected applicants, because there is no factual overlap between the discrimination claims of the current employees and those of applicants.[9] As the First Circuit

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[9] *See* DeGrace v. Rumsfeld, 614 F.2d 796, 809-10 (1st Cir. 1980); Abron v. Black & Decker (U.S.) Inc., 26 Fair Empl. Prac. Cas. 369 (4th Cir. July 17, 1981); Hill v. Western Elec. Co., 596 F.2d 99, 101-02 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); EEOC v. Detroit Edison Co., 515 F.2d 301, 310-11 (6th Cir. 1975) ("serious doubt" that such representation is proper) (dictum), *vacated and remanded on other grounds sub nom.* Local 223, Utility Workers v. EEOC, 431 U.S. 951 (1977); *cf.* Scott v. University of Delaware, 601 F.2d 76, 87 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) (doubtful after *East Texas Motor Freight* that person not injured by hiring practices can represent class challenging such practices); Golden v. Local 55, Int'l Ass'n of Firefighters, 633 F.2d 817, 824 (9th Cir. 1980) (current employees may not represent future applicants because they have not been "injured in the same way"); Chavez v. Tempe Union High School Dist. No. 213, 565

reasoned in *DeGrace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980), in the absence of such a factual overlap there is no "community of interest" between a current employee and rejected applicants in seeking the elimination of discriminatory hiring barriers.[10] Thus, the current employee does not have a sufficient personal self interest in pressing the claims of applicants to safely permit him to act as their representative.[11] Where, as here,[12] the named plaintiff can establish his own personal claim without resolving a single issue relevant to the hiring

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F.2d 1087, 1094 n.10 (9th Cir. 1977) (individual action; person not suffering hiring discrimination has no standing to raise such claims). *See also* Walker v. World Tire Corp., 563 F.2d 918, 921-22 (8th Cir. 1977).

[10] 614 F.2d at 809. The First Circuit noted in *DeGrace* that in some cases there may be a significant factual overlap between the claims of applicants and current employees—for example, where the same test is used for making hiring decisions and transfer decisions. *Id.* at 809. In such cases, the typicality requirement might not bar a current employee from representing applicants.

[11] *See DeGrace*, 614 F.2d at 809-10. The former Reporter of the Rules Advisory Committee has written that the inclusion of the typicality requirement "emphasizes that the representatives ought to be squarely aligned in interest with the represented group." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 387 n.120 (1967). Another commentator has succinctly explained why an identity of interest is needed: "self-interest, the motivating force that sparks the adversary system, also sustains the doctrine of class actions. We may trust man to help his fellow man if by doing so he helps himself . . . ." Homburger, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609, 610 (1971). *See* 1 H. Newberg, Class Actions § 1115a (1977).

[12] None of the evidence presented by Falcon on his promotion claims bore any relevance to the hiring claims of the class. The evidence presented of promotion discrimination was largely live testimony designed to support a disparate treatment theory. The evidence of hiring claims was entirely statistical in nature and, as such, supported a disparate impact theory.

claims of rejected applicants, there is no efficiency gained by allowing the representative plaintiff to press hiring claims and the named plaintiff has little incentive to take vigorous actions to protect the interests of unsuccessful applicants.[13] In such cases, the interests of current employees and applicants are so different in kind that claims of current employees may not fairly be said to be typical of the claims of the applicants.

B. *The Fifth Circuit's Holding That a Current Employee Is an Adequate Representative of Unsuccessful Applicants Conflicts with the Decision of This Court in* General Telephone Co. of the Northwest *and with a Decision of the Court of Appeals for the Third Circuit*

While it is important that the representative plaintiff have claims typical of those of the class he seeks to represent, it is even more important that the named plaintiff not have interests actually or potentially in conflict with the members of the proposed class: in such cases the class representative would have an incentive to see that those he seeks to represent do not prevail on their claims or do not obtain appropriate redress for their injuries.[14] As the Court made clear in *General Tele-*

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[13] *See* Talley v. Hoechst Fibers Indus., 24 Fair Empl. Prac. Cas. 580, 584-85 (D.S.C. 1979); Williams v. Wallace Silversmiths, Inc., 75 F.R.D. 633, 635 (D. Conn. 1976), *appeal dismissed*, 566 F.2d 364 (2d Cir. 1977). *See generally* Hansberry v. Lee, 311 U.S. 32, 45 (1940); Patterson v. General Motors Corp., 631 F.2d 476, 481 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1988 (1981); Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 474-75, 489 (N.D. Cal. 1978); Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. Legal Stud. 47, 48-54, 73 (1975); 13 Harv. C.R.-C.L. L. Rev. 175, 189 (1978).

[14] *See generally* Hansberry v. Lee, 311 U.S. 32, 44 (1940); Note, *Due Process Rights of Absentees in Title VII Class Actions: The Myth of Homogeneity of Interest*, 59 B.U. L. Rev. 661, 673-80 (1979).

phone Co. of the Northwest, the adequate representation requirement is typically construed to preclude a class action where there are such conflicting interests between the named plaintiff and putative class members.[15]

Moreover, the Court in *General Telephone Co. of the Northwest* specifically commented upon the existence of potential conflicts of interest between employees and applicants that would preclude the same plaintiff from representing both classes: "In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes." 446 U.S. at 331.

The Third Circuit had earlier reached a similar conclusion. In *Scott v. University of Delaware*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979), the court held that a current employee could not be an adequate representative of a class of applicants since his interests were necessarily in conflict with those of applicants for two reasons—first, because he had personally benefitted from the hiring procedures he was seeking to attack on behalf of applicants, and, second, because he would have been in sharp competition for contract renewal and tenure with any applicants who might be offered positions as a result of his suit. *Id.* at 86 & n.21.

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[15] *See* 446 U.S. at 331. *See also* Sosna v. Iowa, 419 U.S. 393, 403 (1975); East Texas Motor Freight, *supra*, 431 U.S. at 405; *see generally* Note, *Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23*, 53 B.U. L. Rev. 406, 410, 418-27 (1973).

This case also presents a clear potential conflict.[16] The relief requested by Falcon for promotion discrimination included a requirement that General make good faith efforts to fill its management level positions with Spanish-surnamed Americans until 5.24% of these positions were held by Spanish-surnamed Americans.[17] Moreover, General had already voluntarily implemented an affirmative action plan under which there were specific minority goals and timetables. (Trial Transcript at 357-58.) Most management positions were filled by internal promotions and these promotions were not made on the basis of seniority. (Fifth Cir. App. at 181, 210, 219, 319.) Finally, promotions within the hourly bargaining unit were not made exclusively on the basis of seniority. (Fifth Cir. App. at 180-81, 283.) In these circumstances, it was in Falcon's interest that the total number of Mexican-American employees be kept low, in order to reduce the number of persons with whom he would be competing for the slots reserved for Mexican-Americans under the preexisting affirmative action plan and under the plan he had proposed.

Indeed, the facts of this case illustrate the danger of allowing current employees to represent applicants.

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[16] There may be rare cases where the interests of employees and applicants are not necessarily conflicting. *See, e.g.*, Bartleson v. Dean Witter & Co., 86 F.R.D. 657, 671 (E.D. Pa. 1980) (no apparent conflicts where former employee not seeking reinstatement seeks to represent applicants); Kuhn v. Philadelphia Elec. Co., 80 F.R.D. 681, 685 (E.D. Pa. 1978) (no antagonism between named employee plaintiffs and applicants where promotions based on seniority and all named plaintiffs had been hired prior to date for which retroactive seniority could be rewarded to applicants).

[17] Fifth Cir. App. at 220. General voluntarily included this provision in its own proposed order governing relief, *id.* at 279, and the trial court ordered this relief, *id.* at 291.

From the beginning of this case, Falcon has shown little interest in the claims of those allegedly suffering from hiring discrimination. His EEOC charge did not mention hiring discrimination and he testified that he did not know even a single Mexican-American whose application had been rejected by General. At trial, the plaintiff presented only a few exhibits, statistical in nature, pertaining to hiring discrimination; the remainder of his case pertained to claims of discrimination in promotions. Moreover, although Falcon sought specific goals for *promotions of* Mexican-Americans, he sought only increased recruiting efforts as the injunctive remedy for *hiring* discrimination against Mexican-Americans.

The situation is not of concern only to class members: if the findings of hiring discrimination are reversed on remand, the apparent conflict of interest between Falcon and applicants, coupled with his lack of knowledge about these claims and his indifferent approach to the presentation of evidence concerning hiring claims at trial, may give rise to assertions by class members that this case should not be given res judicata effect because Falcon was not an adequate representative for purposes of due process.[18]

II. The Fifth Circuit's Decision Raises Important and Recurring Questions Concerning Employment Discrimination Class Actions That Urgently Need Resolution by This Court

Many courts and commentators, including the court of appeals in this case, have noted the extraordinary disarray in the lower courts concerning the appropriate ap-

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[18] *See* Willborn, *Personal Stake, Rule 23, and the Employment Discrimination Class Action*, 22 B.C. L. Rev. 1, 21 n.111, 22 n.116 (1980); text and notes at notes 24-27 *infra*.

proach to rule 23(a) in employment discrimination class actions. *See, e.g., Vuyanich v. Republic National Bank*, 505 F. Supp. 224, 235-36 & n.10 (N.D. Tex. 1980); Note, *supra* note 14, at 672. One commentator has concluded that the continuing split of the courts after *East Texas Motor Freight* has "aggravated the chronic uncertainty surrounding the application of rule 23" and has resulted in a situation where "[w]hether any particular case will be certified as a class action depends less on rules of law than on the district judge's selection of precedent." *See* Rutherglen, *supra* note 4, at 724. In addition, as discussed above, the courts of appeals have taken directly conflicting positions on the propriety of representation of applicants by current employees.[19] The number of employment discrimination class actions in itself would be sufficient reason for the Court to resolve these recurring questions.[20]

Of course, these issues have broad social importance as well. In rule 23(b)(2) class actions, the homogeneity of the class should render the action binding as a matter of res judicata on all class members.[21] Thus, as Judge

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[19] *See* Fields v. Village of Skokie, 502 F. Supp. 456, 460-61 (N.D. Ill. 1980) (noting conflict among the circuits and rejecting "minority" view of Fifth Circuit); Gilchrist v. Bolger, 89 F.R.D. 402, 407 (S.D. Ga. 1981).

[20] During one recent year Title VII class actions comprised almost twenty-five percent of all class actions filed in federal courts. *See* Annual Report of the Director of the Administrative Office of the United States Courts at A-170 (1980).

[21] *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248-49 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Fed. R. Civ. P., Advisory Committee Notes, 39 F.R.D. at 99, 106 (1966). *But cf.* Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979) (res judicata effect of prior class action does not bar member of class certified under rule 23(b)(2) from bringing subsequent suit for money damages unless he received actual notice of the prior action). *See generally* Note, *supra* note 14, at 685-88.

Godbold perceptively pointed out in a concurrence to the very first "across the board" opinion by the Fifth Circuit, the certification of an overbroad class action may have "catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class." *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring). Moreover, the combination of disparate claims poses the very real danger that the claims of absent class members will be slighted or overlooked by the named plaintiff and the attorney representing the class.[22] Thus, continued utilization of the across the board approach may frustrate, rather than further, the public policy against employment discrimination.[23]

On the other hand, because a class action cannot, consistently with due process, be given binding res judicata effect unless the representative plaintiff had interests in common with the absentees and adequately represented those interests,[24] the certification of very broad classes in

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[22] *See* Talley v. Hoechst Fibers Indus., 24 Fair. Empl. Prac. Cas. 580, 584 (D.S.C. 1979); Willborn, *supra* note 18, at 33-34 & n.185 (inadequate class representative may too readily compromise class claims).

[23] *See* Shawe, *Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance with Federal Rule of Civil Procedure 23(a)*, 19 Wm. & Mary L. Rev. 469, 486-87 (1978); *cf.* Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 38 (N.D. Cal. 1977) ("'liberal' application of Rule 23 to Title VII cases will not necessarily promote its remedial purposes if it means failure to adhere to and fully enforce the requirements of Rule 23 whose purpose is to balance and protect the rights of all parties, present and absent").

[24] *See* Hansberry v. Lee, 311 U.S. 32, 43-45 (1940). *See generally* Note, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. Pa. L. Rev. 1217 (1975).

employment discrimination cases may well subject defendants to successful collateral attacks from absent class members on judgments entered in their favor in class actions.[25] This would raise substantial questions about the policy of finality of judgments[26] and about the fairness of subjecting defendants to what is, in effect, one-way intervention by absent plaintiffs.[27]

In addition, as this case vividly illustrates, across the board certification does not necessarily effect an economy of judicial resources by efficiently consolidating claims presenting common issues. Instead, to the extent that this approach permits or requires joint trial of the dissimilar claims of a plaintiff who is an incumbent employee and a class of unsuccessful applicants, it complicates the litigation of the employee's claim and accelerates, if not unnecessarily forces, litigation of the possibly non-existent claims of applicants. *See* Shawe, *supra* note 23, at 488 & n.101.

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[25] *See* Talley v. Hoechst Fibers Indus., 24 Fair Empl. Prac. Cas. 580, 584-85 (D.S.C. 1979); *see, e.g.*, Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 350-52 (E.D. Va. 1976), *vacated on other grounds*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979). *See generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974).

[26] *See* Kyriazi v. Western Elec. Co., 647 F.2d 388, 394 (3d Cir. 1981) (recognizing "strong interest of the judiciary in maximizing the res judicata effect of a class action judgment"). *See generally* Note, *supra* note 24, at 1246-49.

[27] *See generally* Fed. R. Civ. P., Advisory Committee Notes, 39 F.R.D. at 105-06 (1966); Note, *supra* note 25, at 601 (quoting Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968)): "To facilitate successful challenges to the binding effect of class action judgments is to create a postjudgment election to opt out—'a return to one-way intervention under a new guise.'"

Finally, Petitioner is not asking that this Court end broad-based class actions in employment discrimination cases; adherence to the requirements of rule 23(a) will not prevent employees with differing factual situations from banding together in a single class where there are significant issues in common and no intra-class conflicts.[28] However, in the absence of an affirmation from this Court that there *are* limitations that are applicable in this and similar commonly occurring situations, some lower courts will persist in certifying overly broad classes through rote application of the across the board theory, without due consideration of whether, on the facts of the particular case, the requirements of rule 23(a) have been met. And, as many courts and commentators have noted, the availability of the across the board theory can transform every individual claim of discrimination into a sweeping class action, with an enormous increase in the bargaining power of individual plaintiffs and their attorneys.[29]

III. The Class Certification Issue Should Be Resolved by This Court Before the Case Is Returned to the Trial Court for Further Proceedings

The primary focus of the decision whether to grant certiorari must be on the broad public importance of the issue presented. *See* Rule 17, Rules of the U.S. Supreme Court. Yet it should also be noted that from the standpoint of the individual parties this case is now at a pro-

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[28] *See* Harris v. White, 479 F. Supp. 996, 1009-10 (D. Mass. 1979).

[29] *See, e.g.*, Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 479 (N.D. Cal. 1978); Rutherglen, *supra* note 4, at 725-26 & n.214; Shawe, *supra* note 23, at 489-92; *cf.* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits: The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971) (suggesting that over-broad classes are "a form of legalized blackmail").

cedural juncture at which it would be particularly appropriate for this Court to resolve the crucial class certification issue presented by this petition.

This Court's previous order granting certiorari vacated the prior Fifth Circuit ruling in its entirety; it was not a limited grant of certiorari. On remand, however, the Fifth Circuit reinstated its prior opinion, with the single exception of that portion of its opinion dealing wth the burden of proof applicable to Falcon's individual claim, and remanded the case to the trial court for further consideration of both Falcon's individual claim and the hiring claims of the class.

Thus, the parties and the trial court will have to conduct further proceedings on both Falcon's claims and the class claims before there can be a definitive resolution of the fundamental issue of whether Falcon was properly certified as the representative of the class of unsuccessful applicants. Moreover, the class certification issue cannot be mooted by any further proceedings in the trial court.[30]

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[30] There are three reasons for this. First, the need to determine whether the initial certification of the class was proper could not be eliminated by a decision by the trial court on remand that Falcon's individual promotion claim was meritless. *See* East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395, 406 n.12 (1977). Second, whether the district court utilized the proper burden of proof in ruling upon Falcon's individual claim of *disparate treatment* in promotions is wholly irrelevant to whether the trial court correctly analyzed the hiring claims of the class, which are premised on a *disparate impact* theory. *See* Vuyanich v. Republic Nat'l Bank, 26 Fair Empl. Prac. Cas. 1127 (N.D. Tex. August 4, 1981). Third, if the class did prevail on remand, General would again be forced to appeal the initial certification of the class as improper. But, if the class did not prevail on remand, General would remain subject to collateral attacks on the judgment, *see* text and notes at notes 24-27 *supra*, and if the class appealed from an adverse judgment, General could again raise the class certification question in defense.

On many occasions, this Court has found facts similar to those presented here to justify a grant of certiorari. First, although the Fifth Circuit's remand order is not a "final" order, finality is not a prerequisite for the issuance of a writ of certiorari to a court of appeal under 28 U.S.C. § 1254(1) (1976). This rule is sound, for it allows the Supreme Court to avoid the morass of fine distinctions and complex decisions that are necessary to determine whether a judgment is "final" under other statutes [31] and it permits the Court to resolve issues fundamental to the further conduct of a case prior to remand of the case back to the trier of fact (thus avoiding piecemeal review). *See* 12 *Moore's Federal Practice* ¶ 434.01, at 6-47 to 48 (1980). Second, the Court has indicated that it is appropriate to review a remand order by a court of appeals where the issue presented is "fundamental to the further conduct of the case." [32] This Court

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[31] *See, e.g.*, 28 U.S.C. § 1291 (1976) (allowing courts of appeal to review "final" decisions of the district courts); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-87 (1975) (construing four categories of exceptions to final judgment requirement of 28 U.S.C. § 1257 (1976)).

[32] United States v. General Motors Corp., 323 U.S. 373, 377 (1945); *see, e.g.*, Larson v. Domestic & Foreign Commerce Corp. 337 U.S. 682, 685 n.3 (1949); Land v. Dollar, 330 U.S. 731, 734 n.2 (1947); C. Wright, Handbook on the Law of Federal Courts 531 (3d ed. 1976), and cases cited; *cf.* Gillespie v. United States Steel Corp., 379 U.S. 148, 153 (1964) (in construing finality requirement of 28 U.S.C. § 1291 Court noted that "the eventual costs . . . will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided").

Indeed, if the Court's experience under 28 U.S.C. § 1257 (which governs the Court's jurisdiction to issue writs of certiorari to the highest courts of the states) is any guide, it is important that the Court be willing to interpose itself at the point when an appellate court has ordered an ill-advised remand to a trial court, particularly where there are no countervailing considerations of federalism and comity. *See generally* Note, *Remand to State Courts and Its Effect*

has previously indicated that the issue of whether a class has been properly certified is fundamental to the further conduct of a case.[33] Third, in the closely analogous context of whether a judgment is final for purposes of statutes other than section 1254(1), the Court considers it highly relevant that a remand cannot moot the question presented.[34] Finally, in many previous cases where, as here, there is a conflict among the courts of appeals on fundamental questions or a conflict between the decision of a court of appeals and the decision of this Court, the Court has issued writs of certiorari to review remand orders.[35] In sum, all of the above factors make it appropriate for the Court to review this case prior to any remand to the trial court.

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on the Dual-Sovereign System, 50 Geo. L.J. 819, 822, 847-49 (1962); Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 Harv. L. Rev. 1251 (1954).

[33] *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (whether to certify a class and how large the class should be is often of "critical importance" to both plaintiffs and defendants); *see, e.g.*, East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395 (1977) (certiorari granted to review order of court of appeals certifying a class and remanding for further proceedings).

[34] *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 480 (1975); Brady v. Maryland, 373 U.S. 83, 85 n.1 (1963). *See* text and note at note 30 *supra*.

[35] *See, e.g.*, Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 408-09 (1916); Prudence Co. v. Fidelity & Deposit Co., 297 U.S. 198, 205 (1936). *See generally* R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 308 at 624-27 (1936); R. Stern & E. Gressman, Supreme Court Practice 302 (5th ed. 1978). The Court has previously granted certiorari in cases presenting similar facts—where certiorari had previously been granted and the court of appeals had entered a second order. *See, e.g.*, Ballard v. United States, 329 U.S. 187, 190 (1946).

CONCLUSION

For all of these reasons, the Petitioner requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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September 1981

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-3587

MARIANO S. FALCON,
Plaintiff-Appellee
Cross-Appellant,

versus

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Texas

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ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

(May 29, 1981)

Before TUTTLE, RANDALL and TATE, Circuit Judges.

TUTTLE, Circuit Judge:

The judgment of this Court in this case having been vacated by the Supreme Court and remanded for further consideration in light of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. —— (1981), the

case is now remanded to the District Court for further proceedings not inconsistent with *Burdine*.

The Court did not deal with that part of our prior judgment that decided or remanded non-*Burdine* issues for further consideration of the trial court. We, therefore, reinstate Parts IV and V of our original opinion.

REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-3587

MARIANO S. FALCON,
Plaintiff-Appellee-Cross-Appellant,

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(June 24, 1981)

Before TUTTLE, RANDALL and TATE, Circuit Judges.

TUTTLE, Circuit Judge:

It appearing that in our Order of May 29, 1981, we did not fully specify our non-*Burdine* issues, we now amend the last sentence of that Order to read as follows:

We, therefore, reinstate parts I, II, IV, V and VI of our original opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-3587

MARIANO S. FALCON,
Plaintiff-Appellee
Cross-Appellant,

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Defendant-Appellant
Cross-Appellee.

Sept. 22, 1980

Appeals from the United States District Court
for the Northern District of Texas

Before TUTTLE, RANDALL and TATE, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal from a judgment for the plaintiffs in a class action Title VII employment discrimination suit. We affirm part of the trial court's decision and remand the rest for further proceedings.

This class action, filed originally by Mariano S. Falcon, a Mexican-American, challenged the hiring and promotion practices of the defendant employer, General Telephone Company of the Southwest (General), on the ground that General impermissibly discriminated on the basis of national origin against Mexican-Americans (Spanish speaking Americans).[1] Falcon applied for a

[1] In this opinion, as in the court below and in the briefs, Mexican-Americans and Spanish speaking Americans are used interchangeably.

job with General in July of 1969. He was hired as part of an affirmative action program, and after a training period, he began work as a groundman. After one month, he was promoted to lineman and a short time later, he was promoted to lineman in charge. One year after he was hired, he turned down a promotion to installer-repairman, and he did not receive any other promotion prior to October, 1972, at which time he applied for a promotion to Field Inspector. He did not receive this promotion although several other non-Mexican-Americans with less seniority than Falcon received the promotion. Falcon then filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging that General discriminated in the area of promotions.[2]

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[2] The factual portion of the EEOC charge stated:

"I believe that I have been discriminated because of my national origin—SSA. I have been passed up for promotion to inspector by whites with less seniority and less experience than I have. This is contrary to my union's seniority system as depicted by the Collective Bargaining Agreement. Also, I believe that the Company's promotion policy has operated against a class—SSA."

The attached affidavit of Falcon stated:

"I was hired by General Telephone in July, 1969, as a groundman. A month lated I made lineman, and a month later lineman-in-charge. I have received no further advancement.

The normal progression of jobs from bottom to top is as follows: groundman, lineman, lineman-in-charge, inspector, crew foreman, and finally, construction foreman.

My present supervisor, Bill Hamrick (white), made lineman-in-charge the same time I did. He has since become a construction foreman.

Jerry Hoffman (white) was hired in the latter part of 1970 and was promoted from groundman to inspector within six months. Two months later he was made a crew foreman, and two months later a construction foreman.

Randy Railey (white) was hired in the latter part of 1970 and was made an inspector from lineman within a year. He is now an installer-repairman in Carrollton, Texas.

[Continued on page 6a]

He filed suit in early 1975, challenging both the hiring and promotion policies of General in a class action suit. The trial court certified the class, but limited the class to those Mexican-American employees who had applied for employment or were employed in General's Irving, Texas division.

At Phase I of the trial,[3] the district court decided that General had discriminated against the plaintiff with respect to promotion, but not with respect to hiring, and that General had discriminated against the other members of the class with respect to hiring, but not with respect to promotions. The court apparently based its finding of discriminatory hiring on statistics, introduced by the plaintiff, which indicated that Mexican-Americans represented 5.24% of the work force in the Dallas/Fort Worth area, the relevant area for Irving, while only 1.22% of General's employees in 1972 were Mexican-American. The trial court also relied on the fact that 20 Caucasians were hired in 1972, as opposed to no Mexi-

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[2] [Continued]

Jerry Eden (white) was hired in April of 1972 as a lineman. He had seven years experience as a contractor. He was given duties of inspector on September 18, 1972.

I believe that I have been discriminated against by my company's promotional policy because I am SSA. Witnesses who will attest to both my qualifications and the facts in this affidavit are: (1) Bob Ferguson; (2) John Chamberlain—Union Steward of my union, CWA—Communication Workers of America; (3) Rick Schaeffer; (4) Stanly Mann; (5) Mike Wilcox; (6) Willie Baxter; (7) Pete Butler . . . all whites.

Mr. Loy Goldston is my area supervisor and Mr. Rhett Mun is my district supervisor."

[3] The different hearings will be discussed as Phase I, Phase II, etc. At Phase I, the trial court found liability and ordered injunctive relief. At Phase II, the trial court determined damages.

can-Americans, and that in 1973, only 4% of those hired were Mexican-American.[4] *See* note 16 *infra*.

With respect to hiring at Phase I, there was testimony that General had a policy of keeping all applications active for only three months. The court found that none of the applicants were informed of this time limit, that the applicants were not informed as to what positions were open, and that they were not informed as to the quali-

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[4] General presented statistical evidence showing the following, in part:

a) The percentage of General's new hires at its Irving facility which were Mexican-Americans was:

1973	4.0%
1974	13.2%
1975 (through 7/30)	18.8%

b) In the available labor market in the Dallas/Ft. Worth area, the percentage of Spanish-surnamed Americans was 5.24%; in Irving it was 3.6%.

c) The percentage of Mexican-Americans and whites who were hired from the applicant pool for that group.

	Whites	Mexican-Americans
1973	10%	17%
1974	3.3%	17%
1975	0.7%	10.3%

In its brief in this Court, General also argues that both it and the plaintiffs' statistics show the following:

a) *July 1972-June 1976*: 7.73% of those hired at Irving were Mexican-Americans.

b) *1973-1976*: 18.3% of all Mexican-American applicants were hired, although only 2.98% of General's applicants were Mexican-Americans.

c) *1973-1976*: 5.66% of General's white applicants were hired, although 81.5% of the work force in the area was white and 86.65% of the applicants were white.

The trial court also found that General employed 526 people, but that only one of 66 management employees were Mexican-American. *See* note 16 *infra*.

fications for any of these positions. Thus, General was given the burden of proving at Phase II that there had not been any job openings for which the class members had been qualified after the three month period.[5]

As stated previously, the trial court also decided that Falcon was discriminated against in promotions. The court based its decision there on its finding that General's proferred reasons for promoting the other men, rather than Falcon, were insufficient and subjective. Therefore in Phase I, as a preliminary part of its relief order, the court ordered the defendant to take numerous affirmative action steps and the judge held that the plaintiff and the class were entitled to attorney's fees.

At Phase II of the trial, the court ruled that General had not met its burden of proving that there had been no available openings for the class applicants who wished to be hired after the three month "active" application period. All 13 class members therefore received back pay awards and job security awards to compensate them for the fact that if they had been hired by General, they would have been in a union. The judge also awarded attorney's fees to the plaintiff and class.

Both sides appeal from this judgment. The Appellant, General, bases its appeal on a number of issues. It argues that:

(a) The trial court erred in certifying the class;

(b) The trial court did not have jurisdiction over the discriminatory hiring claim since the EEOC charge related solely to a discriminatory promotion policy claim;

(c) The trial court erred in finding that the plaintiff below had been discriminated against with respect to promotion;

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[5] The court based its burden of proof ruling on the fact that General's hiring policies exacerbated its discriminatory policies.

(d) The trial court erred in finding that the defendant below had discriminated against the class with respect to hiring;

(e) The trial court erred in admitting reports from the General Service Administration (GSA);

(f) The trial court erred in making back pay awards without sufficient evidence that job openings existed for which the class members were qualified;

(g) The trial court erred in finding the application procedure unreasonable;

(h) The trial court awarded too much in back pay;

(i) The trial court awarded too much in attorney's fees.

The appellee, Falcon, argues that:

(a) The trial court erred in limiting the class to those employed in the Irving division;

(b) The trial court awarded too little in back pay.

We shall examine each of these issues in the approximate order they were raised at trial.

I. *Class Certification*

The appellant argues that under Rule 23, the trial court erred in certifying the class at all. On his cross-appeal, Falcon claims that the only error involved in the certification was the trial judge's limiting of the class to Mexican-Americans who are employed at or have applied to the Irving division of General, rather than all of the divisions. We shall examine each of those issues in turn.

The appellant bases its argument on three theories. It says the claim of the class representative was not typical of the claims of the class; that the class representative

could not fairly and adequately protect the interest of the class, and that the questions of law and fact raised by the claims of the class representative were not common to the questions of law and fact raised by the claims of the class. General also argues that the failure of the trial court to hold an evidentiary hearing on this matter may, in itself, require a reversal of certification.

A. *Failure to Hold a Hearing*

General alleges that the failure to hold an evidentiary hearing on the issue of certification requires reversal of the certification, citing *Satterwhite* v. *City of Greenville*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vac. and remanded*, 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1980). Falcon says, in opposition, that such a hearing was not necessary.

We disagree with General's contention that the failure to hold such a hearing, in itself, requires a reversal of certification. It is true that this Court has repeatedly stressed the importance and value of such an evidentiary hearing on the certification issue. *Satterwhite* v. *City of Greenville*, 578 F.2d 987, 998 (5th Cir. 1978) (en banc), *vac. and remanded on other grounds*, 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1980); *King* v. *Gulf Oil Co.*, 581 F.2d 1184, 1186-87 (5th Cir. 1978); *Huff* v. *N.D. Cass Co. of Alabama*, 485 F.2d 710 (5th Cir. 1973). But such a hearing is important only in the context of showing whether or not a class should have been certified. If later evidence shows the decision to certify to have been a correct one, there was obviously no need to have held such a hearing. *King* at 1186-87. To prevail solely on a contention that a hearing was required, an appellant must show that if a hearing had been held, it could have affected his rights substantially. That can only occur in a situation in which the district court made a decision to deny certification without a hearing, since it is only in that case that a party can show that there was a substan-

tial issue as to certification and that he was denied an effective opportunity to litigate it. We therefore hold that the mere fact that a class has been certified without a hearing is not a ground for reversal of that decision. Even when no hearing is held before certification is granted, a party has an adequate opportunity later to argue the substantive merits of the decision to certify. We therefore turn to the merits of General's arguments concerning certification.

B. *Appellant's Substantive Class Certification*

Although the appellant argues that the class did not meet three of the requirements of Rule 23(a)[6] most of these claims are based on the appellant's contention that Falcon, who was complaining of discrimination with respect to promotion, could not represent a class complaining of discrimination with respect to hiring. General maintains that according to *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), Falcon cannot represent both hiring and promotional discriminatees because he has not established a sufficient nexus between his claims of promotional discrimination and the other class members' claims of hiring discrimination. *See also Scott* v. *University of Delaware*, 601 F.2d 76 (3rd Cir.), *cert. denied* 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 189 (1979); *Hill* v. *Western Electric Co., Inc.*, 596 F.2d 99 (4th Cir.), *cert. denied* 444 U.S. 929, 100 S.Ct. 271, 62 L.Ed.2d 186 (1979).

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[6] Rule 23(a) states:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In contrast, Falcon argues that this Court has not interpreted the nexus requirement of *East Texas Motor Freight* as restrictively as other courts and that, therefore, this action was properly certified under this Court's standards. *See Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir.), *cert. denied* 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); *Vuyanich* v. *Republic National Bank of Dallas*, 82 F.R.D. 420 (N.D. Tex. 1979); *Satterwhite* v. *City of Greenville*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vac. and remanded* 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1980). Falcon's position is essentially that this Court still permits "across the board" attacks on discrimination.

We agree. In *Payne* v. *Travenol Laboratories, Inc.*; *supra*, this Court said:

> Plaintiffs' action is an "across the board" attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of these discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies. (Citations omitted)[7]

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[7] *See also Satterwhite* v. *City of Greenville*, 578 F.2d 987, 993-994 n.8 (5th Cir. 1978) (en banc), *vac. and remanded*, 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1980) in which this Court said:

> . . . Nor is Rodriguez or this opinion contrary to the policy favoring "across the board" Title VII class actions. *See Johnson* v. *Georgia Highway Express* [417 F.2d 1122 (5th Cir.)], *supra*. It is not necessary that the representative suffer discrimination in the same way as other class members, but it is necessary that she suffer from the discrimination in some respects.

As noted, *Satterwhite* was subsequently vacated and remanded by the Supreme Court. In *Satterwhite*, a job bias claimant, an

[Continued on page 13a]

It is therefore apparent that this Court permits an employee complaining of one employment practice to represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin. It is consistent with the holding in *Rodriguez* and the policy of Title VII to allow a plaintiff to represent a class suffering from a common discriminatory complaint. While similarities of sex, race or national origin claims are not dispositive in favor of finding that the prerequisites of Rule 23 have been met, they are an extremely important factor in the determination, that can outweigh the fact that the members of the plaintiff class may be complaining about somewhat different specific discriminatory practices. *See also Quigley* v. *Braniff Airways, Inc.*, 85 F.R.D. 74, 78-79 (N.D. Tex. 1979); *Cooper* v. *University of Texas at Dallas*, 482 F.Supp. 187, 192 (N.D. Tex. 1979). In addition here, the plaintiff showed more than an alliance based simply on the same type of discriminatory claim. He also showed a similarity of interests based on job location, job function and other considerations. *Cf. Crawford* v. *Western Electric Co., Inc.*, 614 F.2d 1300, 1304 (5th Cir. 1980).

Given our finding of a sufficient nexus between the plaintiffs' claims and those of the class, we find that the

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applicant for city employment, had been denied the right to represent a class of present and future city employees because she was not a member of the proposed class. The Supreme Court remanded the case for reconsideration in the light of two recent cases. *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) and *U.S. Parole Commission* v. *Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), which broadened the possible use of class actions when the named plaintiff's claim had become moot. Therefore, it seems that the Supreme Court's remand did nothing to question the rule in this Court that "across the board" actions can still be brought.

requirements of Rule 23 were satisfied.[8] *See* note 6. We therefore hold that the trial court acted correctly when it certified Falcon's claim on behalf of these other plaintiffs.[9]

C. *Appellee's Class Certification Claim*

On cross-appeal, the appellee contends that the trial court erred in refusing to extend the class to all Mexican-American employees who were employed by or had applied to any of General's divisions, not just the one at Irving. He contends that since he worked in all of the towns in the Fort Worth, Texas area, and not only in the Irving division, he can properly represent the larger unit.

We find that the district court acted within its discretion in limiting the class to the Irving location, especially

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[8] On the adequacy of representation issue, General also argues that there was no evidence to show the qualifications of the attorneys who represented the class. While it is true that the requirement of adequate representation includes the competence of the legal counsel of the representatives, *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), the competency of counsel can be judicially noticed, as was apparently done in this case. In any event, we do not overturn the trial court's decision on this matter, since it was not an abuse of discretion. *Guerine* v. *J&W Ins., Inc.*, 544 F.2d 863 (5th Cir. 1977); *Boggs* v. *Alto Trailer Sales, Inc.*, 511 F.2d 114 (5th Cir. 1975).

[9] For a similar analysis of *Rodriguez* and *Satterwhite*, *see Vuyanich* v. *Republic National Bank of Dallas*, 82 F.R.D. 420, 432-33 (N.D. Tex. 1979).

With our holding we do not intimate any conflict with the logic of *Crawford* v. *Western Electric Co., Inc.*, 614 F.2d 1300, 1304 (5th Cir. 1980) where the court said that "[t]he fact that plaintiffs are members of the same race as the other employees and rejected job applicants whom they seek to represent in a class action is not enough in itself to require a finding under Rule 23 that their representation was adequate or that their claims were typical of the class." Such a fact by itself, of course, is not enough to meet the requirements of Rule 23.

since the various General divisions each conduct their own hiring. In addition, management of such a large class would be much more difficult. *Cf. Hill* v. *American Airlines Inc.*, 479 F.2d 1057 (5th Cir. 1973).

II. *Jurisdiction to Hear the Claim*

The appellant argues here that the trial court did not have jurisdiction over the claim of hiring discrimination because the EEOC charge referred only to discrimination with respect to promotion. Relying on the opinions in *United Airlines, Inc.* v. *Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) and *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978), General maintains that this Court's holding in *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), that a court could take jurisdiction of claims which are "reasonably" related to the EEOC charge, must be reexamined. The Company also argues that the EEOC investigation and determination concerning hiring were beyond its jurisdiction.

In *Sanchez*, this Court said:

> [T]he civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation. Within this statutory scheme, it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

431 F.2d at 466. Thus in *Sanchez*, this Court endorsed a liberal standard for requirements relating to the relationship between the charge, the investigation, and a civil suit.

The two cases cited by the appellant do not question this standard. In *United Airlines, Inc.* v. *Evans*, 431 U.S.

553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), the Supreme Court held that a stewardess who had failed to complain of her discriminatory discharge was barred from later contending that she was discriminated against after being rehired based on the employer's failure to include her prior employment in determining her seniority. The court held that she was time-barred from complaining of the prior illegal discharge because she had not complained at the proper time. In *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978), this Court followed *Evans* by dismissing as time-barred a cause of action somewhat similar to the one in *Evans*. We find it difficult to see the relevance of these decisions to the issue here.

The question we face is whether an EEOC complaint of promotion discrimination is sufficiently related to a hiring discrimination claim to allow the EEOC to investigate both and therefore authorize a suit based on both charges. In *Gamble* v. *Birmingham So. Railroad Co.*, 514 F.2d 678 (5th Cir. 1975), this Court defined the "reasonable expectation" tests of *Sanchez* again as hinging on whether the broader EEOC investigation might be expected to grow from the original complaint. *Id.* at 688.

Some courts have interpreted the standard of *Sanchez* to mean that any practice which is an outgrowth of the same basis of discrimination can be challenged in the court suit. *See Graniteville* v. *EEOC*, 438 F.2d 32, 41-42 (4th Cir. 1971) (discrimination in promotion related to discrimination in hiring); *McBride* v. *Delta Airlines*, 551 F.2d 113, 115 (6th Cir.), *vacated on other grounds* 434 U.S. 916, 98 S.Ct. 387, 54 L.Ed.2d 273 (1977) (individual firing charge requires review of any racially discriminatory practices because of large and complex corporate structure). *Cf. Arey* v. *Providence Hospital*, 55 F.R.D. 62, 67 (D.D.C. 1972) ("[i]t seems clear that once having received the complaint of discrimination against

complainant the EEOC would as a reasonable matter, extend their investigations to all areas of employment in which the complainant at one time or another had been exposed, including, of course, the facts and circumstances surrounding the initiation of her employment.") This Court in *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975) held that a charge of discrimination in termination will support another claim of discrimination in hiring. Other courts have held that the fact that EEOC ended up investigating a broader charge than the one alleged is a strong reason to allow the issue to be raised in a court suit. *Henderson* v. *First National Bank of Montgomery*, 344 F.Supp. 1373 (M.D. Ala. 1972); *Cf. Oubichon* v. *North American Rockwell Corporation*, 482 F.2d 569 (9th Cir. 1973); Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1216-18 (1971).

We find that the district court had jurisdiction over both the hiring and promotion claims under the *Sanchez* standard. This Court's traditional application of a liberal standard in this area is a reflection of our understanding about the realities of Title VII litigation. Often the complainants are poor and uneducated. They are unfamiliar with legal concepts and often do not comprehend the specific elements of their complaint. But they understand the basic premise of the Act. They feel that they have been discriminated against on the basis of race or some other impermissible factor. To hold these individuals to a high standard of knowledge about the bases of their charge would ill-serve the remedial purpose of Title VII. In this case, it is sufficient that Falcon alleged the type of discrimination ("national origin"), especially since an investigation of promotional practices almost inevitably leads to a study of hiring practices, and the EEOC did investigate both areas. *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d (5th Cir. 1975).

III. *Promotion Claims*

In this part of the appeal, General argues that Falcon never proved he was qualified for the promotion he sought. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). General also says that it articulated valid, nondiscriminatory reasons for not promoting Falcon, namely that those persons who were promoted were more qualified than Falcon, and that Falcon failed to prove that those reasons were merely pretexts for discrimination. *See Board of Trustees* v. *Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978).

In rebuttal, Falcon suggests that the Supreme Court's use of the word "articulate" in *Sweeney*, *supra*, was not intended to cover subjective criteria, but requires "something rationally based."

In "disparate treatment" cases, the plaintiff has the burden of establishing a prima facie case. That can be done by the plaintiff by showing

> (i) That he belongs to a [protected] minority [under the Act];
>
> (ii) That he applied and was qualified for a job for which the employer was seeking applicants;
>
> (iii) That, despite his qualifications, he was rejected; and
>
> (iv) That, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Looking at these requirements, we find that clearly Falcon belonged to a protected minority under the Act;

that he applied for a job for which the employer was seeking applicants; that he was rejected, and that the employer hired others for the position. The only element of the prima facie case which the appellant attacks here is whether or not Falcon had the qualifications for the position he was seeking.

According to General, Falcon was recommended for promotion to a management position by two of his first level supervisors. At General, once a supervisor recommends an employee for a promotion to a management position, that employee is considered for all management positions for which he is considered qualified by reason of prior experience. General says that Falcon was "not considered *the most qualified* person for any of the openings." (Emphasis added.) That claim, however, even if true, does not mean that Falcon was not considered qualified. The fact that Falcon was recommended for promotion to management lends additional support to his contention that he was qualified for those positions. We therefore uphold the trial court's apparent finding that he was qualified and therefore find he made a valid prima facie case.

Falcon's having made that prima facie showing, General has the obligation to "articulate some legitimate, nondiscriminatory reason" for the action to dispel the adverse inference from the prima facie showing. *McDonnell Douglas* at 802, 93 S.Ct. at 1824. As stated in *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), the defendant must also prove that those hired or promoted were better qualified than the plaintiff. *See Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979), *cert. granted* —— U.S. ——, 100 S.Ct. 3009, 65 L.Ed.2d 1112 (1980).

In fact, General did put forth the explanation that the people hired for the positions Falcon wanted were

more qualified than he was.[10] Through statistical evidence, the Company also showed that Falcon had received three promotions in seven years of employment with General, an average of 0.43 promotions a year, while the average white worker at General received only .20 promotions per year. In addition, General said that Falcon received his first promotion only one month after being employed; the average white employee did not receive a promotion until he or she had been employed 14.91 months.

However, the trial court found that the ratings given Falcon and the others who had been promoted *instead* of him were "very similar" (all were favorable). Falcon, the trial court found, had no listed weaknesses except for "underground cable work." Since the trial court concluded that General had discriminated against Falcon, it must have reasoned that since Falcon had essentially the same overall ratings as those whites who were promoted, the Company's explanation that the others were "more qualified" was simply a pretext for discrimination and

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[10] The Company also attempted to prove at trial through the use of statistical evidence that Mexican-Americans, in general, were not adversely affected by General's promotion procedures. The trial court agreed with this second contention.

As to the specific openings about which Falcon complains, the Company says that one individual who was promoted to crew foreman had special training in electronics, went to college, and worked in the electronics field in the military. Another individual, promoted to inspector, had been a foreman with a contractor, and had performed essentially the same duties there, as he would in the job to which he was promoted. A third individual, promoted to crew foreman, the Company says, had held supervisory positions in the military.

The Company says that in the opinion of the second level supervisor, each of the men selected was more qualified than Falcon, who they say had no prior experience in either electronics or the communications industry and had performed unsatisfactorily in supervisory roles.

was not a legitimate reason for failing to promote him.[11] *Cf. Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 567, especially n. 8 (5th Cir. 1979), *cert. granted* —— U.S. ——, 100 S.Ct. 3009, 65 L.Ed.2d 1112 (1980).

Our task here then is to decide if the trial court was clearly erroneous when it concluded that Falcon was as qualified as the other people who were promoted. We conclude that the finding was not clearly erroneous.

As stated previously, General said that it felt Falcon was not the most qualified applicant for any of the openings. But there was credible evidence to the contrary. The EEOC investigator who looked into the case, Robert Ray, testified that he felt Falcon was not promoted because he was a Mexican-American. His notes made at that time, indicated that several people who worked with Falcon and with some of the others who were promoted, felt Falcon was at least as qualified as those promoted, and was not promoted because of his national origin. Ray also prepared a chart comparing, as objectively as possible, Falcon's qualifications and experience with that of the other people promoted.[12] What he found was that

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[11] The trial court also said that the criteria used to rate and to promote were subjective. The trial court reached this decision based on the company promotion procedure. According to the trial court:

"Hourly workers who wish a promotion bid for the job. When a vacancy occurs in a salaried management position, there is no formal posting procedure for hourly employees to be made aware of the vacancies. First line supervisors of hourly employees may make recommendations for promotions. These recommendations go to second line supervisors and the area personnel officer. . . ."

[12] Working with the entire employee file provided by General Telephone, Ray evaluated these employees' qualifications by looking at the date hired, previous experience, the last evaluation before they were promoted out of the lineman position, the date they were

[Continued on page 22a]

Falcon was better qualified than one of the people promoted above him, as qualified as another, and less qualified than the third.[13] Similar findings by EEOC investigators in other cases have been described as "highly probative" by this Court. *Peters* v. *Jefferson Chemical Company*, 516 F.2d 447, 450 (5th Cir. 1975); *Smith* v. *Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972). Despite testimony from others that they considered Falcon less qualified than those hired, the trial court could certainly find that given the EEOC investigator's and Falcon's testimony, Falcon was as qualified as the other people promoted.[14]

We also note that this Court has stated previously that while qualifications are obviously an employer's prerogative, "the standards cannot be automatically applied to freeze out" minorities. *Rowe* v. *General Motors Corporation*, 457 F.2d 348, 358 (5th Cir. 1972). In *Rowe*, this Court recognized that "promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination. . . ." *Id.* at 359. While obviously not determinative in this case since a variety of other factors were considered in the promotion decision, we note that a principal element in that decision were the recommendations of Falcon's su-

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promoted from lineman in charge, the time between the last evaluation and the promotion, and the objective rating on their evaluation.

[13] Hoffman scored a 32, Hamrick a 31, and Raley a 28. Falcon scored a 31 also. *See* note 2.

[14] On General's behalf on this specific point, Jake Goldston, who was Falcon's second line superior, testified about several disciplinary actions taken against Falcon, and said he considered the others promoted to be more qualified than Falcon. Harvey Sumner, a construction foreman who supervised Falcon, testified that he once demoted Falcon because he was less efficient than other employees.

pervisors, all of whom were white. Given this Court's pronouncement in *Rowe*, the trial court could certainly look at the Company's explanations that Falcon was less qualified with some skepticism. *Cf. Fisher* v. *Proctor & Gamble Mfg. Co.*, 613 F.2d 527, 546 (5th Cir. 1980).

We therefore find that the trial court did not act incorrectly when it found that the Company's explanation that Falcon was less qualified than the others promoted was not legitimate or, as the court has put is, "pretextual."

IV. *Hiring Claims*

In this portion of the appeal, General argues that there was insufficient evidence to support the trial court's conclusions that General discriminated against the class members with respect to hiring. General questions both the factual sufficiency of the evidence, as well as the trial court's reliance on some statistics, as opposed to others.

In its Phase I order, the court focused on four statistical "facts:"

(1) 5.24% of the Dallas/Fort Worth labor force was Mexican-American;

(2) 1.22% of General's work force at Irving was Mexican-American in 1972;

(3) Twenty people were hired in 1972, but none of them was Mexican-American;

(4) Only 4% of those hired in 1973 were Mexican-American.

General claims that the district court improperly relied on the statistical disparity between the local labor force and the work force at the Irving facility, rather than relying on the plant hiring statistics for the years between 1972 and 1976. General contends that there is statistical evidence showing that:

(1) Mexican-Americans constituted 7.73% of the persons hired at the Irving facility from July 1972-July 1976, whereas only 5.24% of the local labor market was Spanish-American;

(2) From 1973 through 1976, 71 Mexican-Americans applied for jobs at the Irving facility and 13 were hired, an 18.3% percentage. During this time, only 5.66% of the Caucasian applicants were hired, although 81.5% of the local work force was Caucasian, as were 86.5% of the applicants.

See note 4.

Proof in this sort of class action case is usually dependent upon statistical comparisons. In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.E.2d 936 (1977), the Supreme Court found that a prima facie case of discrimination could be found by showing great disparities in general population/work force statistics.[15] In *Hazelwood School District* v. *United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the Supreme Court found that this same showing of disparity, along with instances of individual discrimination, established a prima facie case. However, there, the Court ruled that this prima facie showing could be rebutted with favorable evidence comparing the qualified labor market with the defendant's hiring policies during the relevant period.

This Court recently said in *United States* v. *City of Alexandria*, 614 F.2d 1358, 1364 (5th Cir. 1980):

> To make out a prima facie case of pattern or practice of discrimination in violation of Title VII,

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[15] In *Teamsters*, the plaintiff also presented many examples of individual discrimination.

> all that a private or government plaintiff need show initially is that there is a significant statistical disparity between the racial, sexual, or ethnic balance and composition of an employer's work force and that of the community from which the workers are hired. . . . This is true because, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters, supra*, 97 S.Ct. at 1856 n. 20.
>
> Once this prima facie case has been established, the employer may introduce evidence to attempt to rebut the inference raised by the figures. . . .
>
> (Citations omitted.)

We take this to mean that once the plaintiff has offered some evidence that is probative of disparity that may be statutorily significant, it is then the defendant's burden to come up with more specific statistical evidence to rebut the plaintiff's proof.

In this case, the trial court found that in 1972, the Irving Division hired 20 Caucasians, but no Mexican-Americans, and that in 1973, the total number of Caucasions hired at Irving was 155 or 76.7% and the number of Mexican-Americans hired was eight or 4%. However, the trial court made no findings about hiring in 1974 or 1975, even though both sides presented statistical evidence at least through the period of July 30, 1975.[16]

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[16] The statistical evidence proffered by the plaintiffs for hiring in the Irving Division showed:

Evidently, the trial court relied on the plaintiff's evidence for its hiring findings concerning 1972 and the defendant for its findings concerning 1973. *See* note 16.

Year	White	Black	Mexican-American
1972	19	1	0
1973	59	6	4
1974	26	6	6
1975	27	1	3
1976	8	0	0
	139	14	13
	(82.7%)	(8.31%)	(7.73%)

The evidence proffered by General, for hiring in the Irving Division showed:

Year	White	Black	Spanish Speaking	Other
1973	155	37	8	2
1974	53	6	9	0
1975 (thru 7/30)	4	9	3	0
	212	52	20	2
	(74.12%)	(15.18%)	(6.99%)	(.01%)

The plaintiff also introduced the following evidence comparing the percentage of Mexican-Americans with the total work force in that area:

Date	% Mexican-Americans
12/70	1.67%
12/71	1.29%
12/72	1.22%
12/73	1.82%
7/74	3.57%
1/75	4.52%
6/76	4.50%

According to the appellant's brief, the statistics in the exhibits presented by the plaintiff and those presented by the defendant vary because the information requested by the plaintiff to prepare his statistical analysis pertained to fewer than all of the Mexican-American applicants and jobs. That may account for some of the difficulty in interpreting this statistical information.

However, the trial court made no findings of fact concerning 1974 or 1975. It appears that the trial court must have found discrimination for those periods since the class action notice approved by the court was addressed to "all Mexican-Americans who applied for work at General Telephone Co. in Irving, Texas, in 1972, 1973, 1974, 1975, and through October 18, 1976." [17] This conclusion is bolstered by the fact that some members of the class who received relief applied for jobs in late 1975 or early 1976.

It would clearly be inappropriate for us to rule on the appellant's claim concerning the use of these hiring statistics, as opposed to applicant flow data, without knowing how or why the trial court relied on the statistical evidence it did and why it found hiring discrimination for the years 1974 and 1975. In *Hazelwood*, the Supreme Court indicated that the determination of what set of statistics are relevant can best be decided on a case-by-case basis. 433 U.S. at 311-312. *See Davis* v. *City of Dallas*, 483 F.Supp. 54, 60 (N.D. Tex. 1979). The evaluation of these statistics involves both a complex legal and factual inquiry. *See e.g., Cooper* v. *University of Texas at Dallas*, 482 F.Supp. 187 (N.D. Tex. 1979); *Davis* v. *City of Dallas*, 483 F.Supp. 54 (N.D. Tex. 1979); *EEOC* v. *Radiator Speciality Co.*, 610 F.2d 178 (4th Cir. 1979). We therefore remand this part of the case

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[17] The complete first part of the notice said:

ATTENTION: ALL MEXICAN-AMERICANS WHO APPLIED FOR WORK AT GENERAL TELEPHONE CO. IN IRVING, TEXAS IN 1972, 1973, 1974, 1975, and through October 18, 1976.

The following lawsuit is now pending in Judge Sarah T. Hughes' Court in Dallas and your rights may be affected. Judge Hughes has found that General Telephone Company of Irving, Texas, discriminated against Mexican-Americans as a class from 1972 to October 18, 1976 and you may be entitled to back wages or other relief under certain conditions.

to the district court for a more specific evaluation of both the plaintiff's and defendant's statistics with specific findings on the use of hiring data as opposed to applicant-flow data, including the reasons why the trial court concludes that the discrimination lasted past 1974.[18]

V. *Admission of General Services Administration (GSA) Reports*

In this portion of the appeal, we deal with appellant's objection to the admission of two letters from the GSA to the appellant, that were obtained from General through discovery. General complains that the letters were not authenticated, that there was no evidence as to the basis for the letters, and that the GSA is not authorized by law to determine whether an employer has violated Title VII.

The appellee claims the letters were admissible under Fed. R. Evid. 803(8) which provides in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (8) Public records and reports. Records, reports, statements, or data compilations, in any form of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . . or (C) in civil actions and proceedings . . ., factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of in-

[18] Such an evaluation of the statistical evidence, in the light of *Hazelwood School District* v. *United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) and subsequent cases will be especially helpful because *Hazelwood* was decided after this part of the trial was completed.

formation or other circumstances indicate lack of trustworthiness.

As to the authenticity point, it is clear that the letters should have been authenticated under Fed. R. Evid. 901 and 902 which require authentication or identification as a condition precedent to admissibility, except in specific situations, none of which is present here. *See* Rule 902. However, the defendant did not object at trial that these documents were not authenticated, but objected only on the grounds that the letters were hearsay and not relevant. This Court has held for some time that "[e]xcept in unusual circumstances, the ground of objection to evidence must be specifically stated in order to preserve the point for appeal; . . ." *Carona* v. *Pioneer Life Insurance Company*, 357 F.2d 477, 480 (5th Cir. 1966); *Colonial Refrigerated Transportation, Inc.* v. *Mitchell*, 403 F.2d 541, 552 (5th Cir. 1968); *Morrow* v. *Greyhound Lines, Inc.*, 541 F.2d 713 (8th Cir. 1976); *see also* F.R.C.P. Rule 46; Rule 103(a)(1), Federal Rules of Evidence. Since General did not make this specific objection, it cannot raise the authentication issue on appeal.

Turning then to General's arguments concerning relevancy and hearsay, under Fed. R. Evid. 803(8) the letters are admissible if they are made pursuant to duties derived from authority granted by law. The letters were prepared by the General Services Administration, according to the appellant, as part of its contract compliance review.[19] While this authorization to investigate obvi-

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[19] Although it is not part of the record, we assume that this contract compliance review was part of GSA's former responsibility to monitor nondiscrimination in employment by government contractors and subcontractors. *See* Executive Order 11246, 30 F.R. 12319 (Sept. 24, 1965), as amended by Ex. Ord. No. 11375, 32 F.R. 14303 (Oct. 13, 1967); Ex. Ord. No. 11478, 34 F.R. 12985 (Aug. 8, 1969); Ex. Ord. No. 12086, 43 F.R. 46501 (Oct. 5, 1978). It is our understanding that subsequent to this action, this responsibility was transferred to the Department of Labor. *See* Executive

[Continued on page 30a]

ously does not parallel the EEOC's authority under Title VII, the letters were admissible under Rule 803(8)(c) since the findings resulted from an investigation made pursuant to authority granted by law. It was certainly within the court's discretion to find that the letters were not untrustworthy. *See* Weinstein and Berger, Weinstein's Evidence § 803(8) [03] at 200-208 (1979).[20]

VI. *The Application Procedure and the Finding that Openings Existed for Which the Class Members were Qualified*

In this portion of the appeal, the appellant urges that the trial judge improperly failed to require the class

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Order No. 12086, 43 F.R. 46501 (Oct. 5, 1978). *Cf. St. Regis Paper Co.* v. *Marshall*, 591 F.2d 612 (10th Cir.), *cert. denied*, 444 U.S. 828, 100 S.Ct. 55, 62 L.Ed.2d 36 (1979).

[20] In *Smith* v. *Universal Services, Inc.*, 454 F.2d 154, 157-58 (5th Cir. 1972), this Court ruled that an EEOC report in a Title VII case was admissible under the Federal Business Records Act, 28 U.S.C. § 1732, since it was prepared in the regular course of the Commission's business and in accordance with express statutory authority. That case was decided before the promulgation of the Federal Rules of Evidence. In *United States* v. *American Cynamid* [*Cyanamid*] *Co.*, 427 F.Supp. 859, 867 (S.D.N.Y. 1977), a case decided after the Rules took effect, that Court held that the business records exception of F.R. Evid. 803(6) which is very similar to 28 U.S.C. § 1732 (*see* Weinstein and Berger, Weinstein's Evidence § 803(6)[02] at 148-151) was not applicable to government records and reports. *But see United States* v. *Orozco*, 590 F.2d 789, 793 (9th Cir.), *cert. denied*, 442 U.S. 920 [99 S.Ct. 2845, 61 L.Ed.2d 288] (1979) (Treasury Enforcement Communications System (TECS) cards admissible under § 803(8)). The court says "governmental functions could be included within the broad definition of 'business' in Rule 803(6)"). We do not address this question of the relationship between Rules 803(6) and 803(8) since we have already decided that these letters are admissible under Rule 803(8), but we certainly do not rule out the possibility that they might also be admissible under the "business records" exceptions as well.

members to bear the burden of proving that they were qualified for an available opening. As a second point, General argues that the trial court improperly found that General's employment policy exacerbated the discrimination.

As noted earlier, we have already decided to remand the issue of the class action hiring claims to the district court for further findings of fact. Without those further findings of fact, it is impossible for us to rule on these issues. Any questions surrounding the application procedures and policy will have to wait for answers until the trial court has indicated more clearly why it found discrimination and why it defined the class in the way it did.

VIII. *Back-Pay Awards*

This issue concerns the sufficiency of evidence with respect to the specific back pay awards. Again, because of our previous decision to remand the hiring claims, we cannot review this part of the trial court's decision as to that portion of the class. However, we can review the claims as they pertain to Falcon, since we have upheld his request for relief.[21]

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[21] Specifically, General argued as to the whole class that there was:

(a) no proof of job availability;

(b) insufficient evidence to support the job security award of $300 because the class members would have been in a union if they had been hired;

(c) insufficient evidence to show what salaries these employees would have earned at General, and

(d) insufficient consideration of evidence indicating that certain employees either chose not to work or were not capable of working.

As to Falcon, the only consideration that would seem to be applicable would be (c).

The appellees also appeal from the trial court's decision on this issue. Again, we will only review those specific complaints that pertain to Falcon.[22]

The appellant claims that there was insufficient evidence to show what salaries the employees would have earned at General. *See* note 21. It is unclear how much of this claim is directed at the award to Falcon. In its Phase II opinion, the trial court calculated Falcon's earnings on the assumption that he would have been promoted to Field Inspector in 1972. *See* Part III.[23] We think there was clearly enough evidence of what Falcon would have earned to support the trial court's findings.

As to those contentions of the plaintiffs which are relevant only to Falcon, the trial court found that damages should be granted only up to the end of the "Phase I" trial, since it found that the defendant, by that date, had

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[22] The appellees argued that the trial court:

(a) undervalued the job security award;

(b) failed to award shift differential pay and increases based on promotion;

(c) failed to make awards for the period between the Phase I and Phase II trial. (The court had ordered specific injunctive relief in an attempt to end all discrimination at the end of Phase I);

(d) failed to award "front pay," or to retain jurisdiction in order to make periodically further back pay awards.

As to Falcon, the considerations that would seem to be applicable would be (c) and (d).

[23] The trial court took into account the fact that Falcon refused a promotion to Installer Repairman in 1970 and that in 1972, he voluntarily stepped down from lineman-in-charge to lineman. The trial court totalled his potential earnings from 10-8-72 to 10-20-76 as $47,336.72. It totalled his actual earnings if he had accepted a position as an installer repairman, when offered, as $46,296.49. It therefore awarded him damages of $1,040.33. Because of a mistake in calculations, Falcon actually should have been awarded a dime less.

remedied the discriminatory practices which gave rise to the litigation. As to Falcon, we do not find that decision to be clearly erroneous, intimating no judgment on the other class claims. In such matters, the trial court has broad discretion. *Cf. Fitzgerald* v. *Sirloin Stockade, Inc.*, 22 EPD ¶ 30,724 (10th Cir. 1980).

VIII. *Attorneys' Fees*

Since a portion of this suit is being remanded, we do not review the attorneys' fee claim at this time.

We therefore remand this case to the district court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART AND REMANDED IN PART.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,

FINDINGS AND CONCLUSIONS

The above entitled and numbered cause was heard by the Court. The Plaintiff, Mariano S. Falcon and the Defendant, General Telephone Company of the Southwest with their attorneys were present. Evidence was presented and arguments heard. The Court after considering the evidence and exhibits, the pretrial briefs, the proposed Findings and Conclusions and other papers filed in connection therewith, finds and concludes as follows:

Findings of Fact as to Falcon

1. Plaintiff, a Mexican-American, was hired by Defendant on July 7, 1969, pursuant to a program devised to employ hard core unemployed minorities. Plaintiff finished only 6 grades of formal schooling and worked as a migrant worker before coming to Dallas. He trained himself and worked as a welder for several years before going with Defendant. Prior to his schooling with the Defendant, he was not trained in the communications area.

2. Defendant is a public utilities company and provides telephone service in a four state area, including the States of Texas, New Mexico, Oklahoma and Arkansas. The headquarters of the General Telephone Company of the Southwest is San Angelo, Texas. Plaintiff worked in the division office located in Irving, Dallas County, Texas. At the time that Plaintiff began to work for the Defendant, the Irving Division including Irving, Carrollton, Grapevine, Azle, Keller and Lewisville, Texas. Subsequently, the Irving Division was restructured to include only Irving, Texas.

3. The Irving facility today employs approximately 526 employees, of which approximately 66 are management or salaried employees, the others being hourly paid employees. Of the 66 management or salaried employees only one is a Mexican-American.

4. There is no evidence that General Telephone discriminated against Falcon in hiring.

5. Upon completing his training course provided by the Defendant in construction fundamentals, the Plaintiff was employed by the Defendant in the position of Ground Worker. After approximately 30 days, the Plaintiff was promoted to Line Worker, and subsequently Line Worker-In-Charge by the end of his first year. He received no further promotion prior to the time his complaint was filed on October 17, 1972.

6. Plaintiff attended various schools while employed by the Defendant company including Construction Fundamentals and Buried Cables Placing before his complaint was filed. The Plaintiff successfully completed all of the courses.

7. All hourly employees, including Falcon, are advised at the time they are hired by General Telephone on the methods for getting transfers and promotions among hourly paid jobs. These methods are also contained in

General Telephone's contract with the Communications Workers of America, the union which represents its hourly paid employees. Hourly paid job openings are posted at numerous locations within the Irving facility. Employees are selected for such position on the basis of seniority with the company and previous experience and training.

8. Hourly workers who wish a promotion to a higher hourly position bid for the job. When a vacancy occurs in a salaried management position, there is no formal posting procedure for hourly employees to be made aware of the vacancies. First Line supervisors of hourly employees may make recommendations for promotions. These recommendations go to Second Line supervisors and the area personnel officer. Falcon indicated his desire for promotion to management once before filing his charge and was recommended by his supervisor. Hourly workers are rated from time to time by their supervisors. All supervisors who rated these employees and recommended them for promotion as well as the Second Line supervisors and area personnel officer who selected employees for management were Caucasians. The criteria used to rate and to promote are subjective and are not based on objective criteria.

9. On October 17, 1972, Falcon, on behalf of himself and a class of Mexican-Americans, filed a charge with the Equal Employment Opportunity Commission against General Telephone alleging discrimination in hiring and promotion because of national origin.

10. Prior to October 16, 1972, Falcon had received two promotions. At that time he was a Lineman in Charge; Jerry Hoffman, hired January 20, 1979, was Construction Foreman, having received 4 promotions; Randall Raley, hired July 27, 1970, was a Cable Splicer with 3 promotions; Jerry Eden, hired January 24, 1972, as Line Worker, was then Crew Foreman after 3 promotions;

William Hamrick, hired August 19, 1969, as Line Worker, was Construction Foreman after 2 promotions. Plaintiff had more seniority than any of these at the time they were promoted over him.

11. Raley had had 2 years previous experience as a telephone Installer Lineman, Jerry Eden five and a half years experience with Outside Plant, and William Hamrick 3 years as Line Foreman and Splicer. Ratings given Falcon, Hoffman, Raley, Eden and Hamrick during their service with the Company were very similar. All were favorable. There were some with weaknesses such as "frequently impresses people unfavorable, needs to make better use of time", some with strengths such as "above average work, impresses people favorably." Falcon had no listed weaknesses except "underground cable work." Everything else was favorable.

12. The EEOC made a finding and determination on January 29, 1974, which held that the timeliness and all other requirements of Title VII had been met by Falcon and that General Telephone was an employer under the definition of the Act.

13. Falcon received a Notice of Right to Sue letter dated January 21, 1975, and initiated this action in the United States District Court for the Northern District of Texas on April 3, 1975.

Conclusions of Law as to Falcon

1. The Court has jurisdiction of this cause of action under 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981.

2. General Telephone did not discriminate against Falcon in connection with his hiring.

3. General Telephone did discriminate against Falcon in its promotion practices.

4. Falcon is entitled to recover compensation for being discriminated against by General Telephone in its promotion practices.

5. Falcon is entitled to recover attorneys fees for his attorney.

Findings of Facts as to Class

1. Plaintiff, Mariano S. Falcon, is a Mexican-American who works for Defendant General Telephone in Irving, Dallas County, Texas. Falcon was hired by Defendant on July 7, 1969, under the program known as Operation Attainment, and subsequently commenced to work as a Ground Worker, which is in the lowest pay group in Defendant's Irving facility. Plaintiff was employed in the Irving Division. Falcon presently holds the position of Cable Splicer, which is in the highest pay group of hourly paid positions in General Telephone's Irving Division.

2. Defendant is a public utility corporation, a wholly owned subsidiary of General Telephone and Electronics, and provides telephone service in the States of Texas, New Mexico, Oklahoma and Arkansas. Defendant's headquarter is in San Angelo, Texas. It has various area and division offices which serve the above referenced states. In 1969, when Falcon commenced to work for General Telephone in the Irving Division, the Irving Division consisted of Defendant's facilities in the cities of Irving, Keller, Grapevine, Lewisville, Carrollton and Azle, Texas. In 1971, the Irving Division was divided and presently consists of facilities located in Irving, Dallas County, Texas. It employs approximately 526 employees, of whom approximately 66 are management or salaried employees and the others are hourly paid employees. There is only one Mexican-American in management or salaried position in the Irving facility.

3. Plaintiff instituted this action on April 3, 1975, individually and as a representative of the class pursuant

to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Thereafter the Court ordered the case to proceed as a class action and the Plaintiff represent the class composed of Mexican-Americans now employed and those who have applied for employment.

4. The percentage of Mexican-Americans in the Dallas-Fort Worth labor force is 5.24% and of Caucasians is 81.5%. Px 21.

5. The percentage of Mexican-Americans employed at the Irving facility in 1972 was 1.22%. Px 16.

6. In 1972, the total number of Caucasians hired at the Irving facility was 20. No Mexican-Americans were hired. Px 17.

7. In 1973, the total number of Caucasians hired at the Irving facility was 155 or 76.7%, the number of Mexican-Americans was 8 or 4%. Dx 8.

8. All hourly employees, including Plaintiff, are advised at the time they are hired by Defendant on the methods for getting transfers and promotions. These methods are also contained in Defendant's contract with the Communications Workers of America, the union which represents Defendant's hourly paid employees, including Plaintiff. Hourly paid job openings are posted at numerous locations within the Irving facility whereby employees are advised of job openings and may indicate their interest in each such opening by signing the posting. Employees are selected for such positions on the basis of seniority with the company and previous experience and training.

9. The average time before a Caucasian received his first promotion at the Irving facility is 14.91 months. The average time before a Mexican-American received his first promotion is 8.28 months.

10. The promotion rate for Caucasians at the Irving facility is 0.20 promotions per year or one promotion every 5 years. The promotion rate for Mexican-Americans is 0.23 promotions per year or one promotion every 4.35 years. Dx 6.

11. General Telephone has an affirmative action plan whereby it has committed to employ all persons in all jobs without consideration to race, color, creed, religion or sex. Each of Defendant's facilities has such a plan, including the facility in Irving, Texas. Defendant has had such a plan since 1972. Prior to that time, Defendant had affirmative action policies, but no formal plan. The affirmative action plan for each of Defendant's divisions is distributed to the Division Manager and his immediate staff.

12. General Telephone's affirmative action program needs upgrading in respect to recruiting, training, staff meetings and promotions.

Conclusions of Law as to Class

1. Plaintiff, Falcon, fairly and adequately represents Mexican-Americans now employed and those who have applied for employment at the Irving facility of General Telephone.

2. General Telephone discriminated against Mexican-Americans at its Irving facility in its hiring practices.

3. General Telephone has not discriminated against Mexican-Americans at its Irving facility in its promotion practices.

4. The members of the class of Mexican-Americans who applied for work at the Irving facility and were not hired are entitled to be compensated, to be determined at a later hearing.

5. Falcon and the class he represents are entitled to reasonable attorney's fees to be determined at a later hearing.

6. In order to accelerate its affirmative action plan, General Telephone is ordered to take the following steps to more actively recruit and promote Mexican-Americans at its Irving facility:

(a) General Telephone will recruit Mexican-American employees through the use of Spanish language newspapers and through the use of employment agencies that specialize in the placement of Mexican-Americans, as well as other minorities. It will recruit at schools with a high Mexican-American enrollment. General Telephone will encourage in writing all Mexican-American employees in the Irving facility to recruit their friends for employment with General Telephone.

(b) In order to make more Mexican-Americans available for openings in management jobs, each Mexican-American employee, on his or her own initiative, may submit name and qualifications to his or her immediate supervisor for consideration for any management job which the employees specifies. The immediate supervisor must review the qualifications of each such employee and submit the names, qualifications and jobs requested to the area personnel office. An area personnel officer must respond to each such employee within a reasonable time and advise him or her of any weakness in his or her qualifications that might hamper his or her being promoted into a requested management job. If there are no such weaknesses in an employee's qualifications, he or she will be considered for each opening thereafter occurring in each position that the employee listed for which he or she is qualified. Each time a

qualified Mexican-American employee is not selected for an opening, the area personnel office must so notify the employee and explain why he or she was not selected. If an employee's qualifications are weak, an area personnel officer will advise each such employee of his or her weakness or weaknesses and of suggested training that should improve those weak areas. After each such employee has improved those areas in which he or she was weak, the employee may then resubmit his or her name, qualifications and jobs requested to the area personnel office.

(c) General Telephone will encourage and sponsor training for higher level jobs for Mexican-Americans by providing college tuition aid and correspondence course aid for Mexican-American employees who apply for such aid. The aid provided will be a refund of 75% for all tuition, registration fees and required books for all courses completed with a grade of C, satisfactory, or an equivalent score, and a refund of 100% for all tuition, registration fees and required books for all courses completed with a grade of A or B, or an equivalent, all such aid being subject to withholding tax. The maximum aid available for any one calendar year is $500 and is based on the following terms:

(1) The employee must be a full time employee who has been employed by General Telephone for at least six months.

(2) The school or course must be accredited by the appropriate association or council, or approved by General Telephone.

(3) The employee must have a current performance rating of good, very good or excellent.

(4) The desired course of study must be on a subject which is a direct technical skill or knowledge requisite of the employee's present job or a job to which he or she aspires and has a reasonable chance of attaining.

(5) School attendance must be on an employee's own time; however, for a course essential to an employee's development which is available only during working hours, a special work assignment schedule may be made if the requirements of the job permit. In such cases, hourly paid employees will be paid only for the hours worked, and salaried employees will be expected to work the normal number of hours in the pay period.

(6) Only courses which are started and completed while the applicant is employed by General Telephone will be subject to eligibility for tuition aid.

(7) All courses and schools must be approved prior to enrollment to warrant tuition aid.

(8) Any time an employee is turned down for tuition aid, or a course or school is not approved, a written explanation from an area personnel officer must be transmitted to such employee.

(d) In addition to the tuition aid program and in addition to the training already provided by General Telephone, Defendant will provide certain home study courses for Mexican-American employees to be completed on the employee's own time. All such courses must be on a subject which is a direct technical skill or knowledge requisite of the employee's present job or a job to which he or she aspires and has a reasonable chance of attaining.

(e) The manager of the Irving facility will hold monthly staff meetings, which shall be attended by all staff members working in the Irving facility, regardless of their reporting lines, at which time minority awareness and affirmative action will be one of the topics discussed. All staff members in the Irving facility, regardless of their reporting lines, will have quarterly meetings with their second level management employees at which time minority awareness and affirmative action will be one of the topics discussed. All second level management employees working in the Irving facility, regardless of their reporting lines, will have quarterly meetings with their first level management employees at which time minority awareness and affirmative action will be one of the topics discussed. At all of these meetings the goals for the employment of Mexican-Americans at all job levels and the statistics concerning the attainment of those goals will be reviewed.

(f) The manager of the Irving facility will insure that all management level employees working in the Irving facility are informed of the fact that their future advancement with General Telephone will depend in part on their attainment of their affirmative action goals and their treatment of Mexican-American employees.

(g) General Telephone will make a good faith effort to fill its openings in management level positions in its Irving facility with qualified Mexican-Americans until at least 5.24% of its management employees in the Irving facility are Mexican-Americans; and Defendant will make a good faith effort to maintain a minimum of 5.24% Mexican-Americans in management positions in the Irving facility at all times.

(h) General Telephone will advise in writing all Mexican-American employees in its Irving facility of the terms of paragraphs (b), (c) and (d) of this order.

(i) The Court shall be provided with copies of the notices required by paragraph (a) and (h) of this order. The Court shall also be provided with all copies of General Telephone's EEO-1 reports which cover employees who work in the Irving facility.

(j) This order shall remain in effect until the percent of Mexican-Americans employed by General Telephone in its Irving facility is at least 5.24% and the percent of Mexican Americans employed in management level jobs at Defendant's Irving facility is at least 5.24% and until both such levels have been maintained for a continuous six months' period, at which time this order will automatically expire. The Court and Plaintiff's attorney must be provided with an affidavit from Defendant that the percentage levels for the required period of time have been achieved.

7. Any finding of fact deemed a conclusion of law is so adopted. Any conclusion of law deemed a finding of fact is so adopted.

Signed this 22nd day of March, 1977.

/s/ Sarah T. Hughes
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

JUDGMENT

On this the 22nd day of March, 1977, the Court enters judgment in the above entitled and numbered cause based on its Findings and Conclusions this day filed.

It is ORDERED, ADJUDGED and DECREED

1. Defendant, General Telephone Company of the Southwest is ordered to pay Mariano S. Falcon compensation for discrimination as may hereafter be found by this Court.

2. Defendant, General Telephone Company of the Southwest is ordered to pay the class, represented by Mariano S. Falcon, compensation for discrimination, as may hereafter be found by this Court.

3. Defendant, General Telephone Company of the Southwest is ordered to pay the attorney for Falcon and the class he represents, an attorney's fee as may hereafter be determined by this Court.

4. Defendant, General Telephone Company of the Southwest, is directed within thirty (30) days to prepare and file an amended affirmative action program containing the elements contained in the Court's Conclusions of Law pertaining to the class.

Costs against Defendant.

/s/ Sarah T. Hughes
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-75-0403-B

MARIANO S. FALCON

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

PRE-TRIAL ORDER

The Court, at a Pre-Trial conference held on October 10, 1975, entered the following Pre-Trial Orders:

I.

The case is to proceed as a class action and the Plaintiff is to represent the class. The class is to be made up of those employees who are employed and employees who have applied for employment in the Irving Division of the Defendant company, and no other division.

II.

Defendant is to deliver to Plaintiff's counsel the affirmative action plans that Defendant company has in effect, or has had in effect.

III.

Plaintiff and Defendant are to hold further negotiations to see if there is a possibility of granting individual relief to the Plaintiff, MARIANO S. FALCON.

IV.

The case to set for trial on March 15, 1976, at 9:30 o'clock A.M.

ENTERED on the 2nd day of February, 1976.

/s/ Sarah T. Hughes
Judge

Page Solo. PRE-TRIAL ORDER

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

ORDER

On this day came before the Court for consideration the Motion to Compel filed by the Plaintiff and the Motion to Reconsider Certification of a Class filed by the Defendant in the above styled and numbered cause.

Upon consideration of those Motions, the briefs and arguments of counsel, and a review of the pleadings in this cause, the Court is of the opinion that the Motion to Compel should be granted and the Motion to Reconsider should be denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant shall supply the Answers to Plaintiff's Interrogatories as far back as Defendant's records, go and for the dates on which the Defendant has records;

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that the Motion to Reconsider is DENIED, and this action shall proceed as a class action; however,

Defendant may at any time raise the issue of this provisionally-certified class during or after the presentation of the class claims and evidence at trial;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this cause shall be reset for April 19, 1976 for trial.

SIGNED AND ENTERED this eleventh day of March, 1976;

/s/ Sarah T. Hughes

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON
Plaintiff

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST
Defendant

ORDER

On this the 31st day of October, 1978, came before the Court Defendant's First Amended Motion to Alter or Amend the Final Judgment or in the Alternative Motion for New Trial and the Court finds that such motion should be DENIED.

It is therefore ORDERED, ADJUDGED AND DECREED that Defendant's First Amended Motion to Alter or Amend the Final Judgment or in the Alternative Motion for New Trial in the above styled and numbered cause be and the same is hereby DENIED.

Signed this the 31st day of October, 1978.

/s/ Sarah T. Hughes
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
N. D. TEXAS
DALLAS DIVISION

No. CA 3-75-0403-B

MARIANO S. FALCON,

v.

GENERAL TELEPHONE COMPANY

Oct. 20, 1978

ORDER

HUGHES, District Judge.

The plaintiff, Mariano S. Falcon, a Mexican-American, was hired by General Telephone on July 7, 1969. He brought this suit against General Telephone for himself and Mexican-Americans similarly situated on April 3, 1975, alleging discrimination in hiring and promotion.

Judgment was rendered on March 22, 1977, the Court finding that Falcon was not discriminated against in hiring, but in promotions the General Telephone discriminated. As to the class, however, General Telephone discriminated in hiring but not as to promotion.

In fashioning the relief in the instant case, the Court has, insofar as possible, made each plaintiff whole for the damage which each named plaintiff suffered. The relief

granted includes awards for backpay, overtime pay, where evidence of overtime work performed was presented, loss of job security, and six (6) percent interest compounded annually from the end of "phase I" of the trial to date on this judgment.

The Plaintiff prays and the Court denies monetary relief for shift differential pay, potential promotions, and "individual initiative" on the ground that such an award would be too speculative. Although the Court is cognizant of the difficulty in ascertaining to an exactitude, damages in back pay awards, the Court has fashioned the relief in a manner which avoids the "quagmire of hypothetical judgments" noted in *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974).

The Court further finds that damages should be granted up to the end of "phase I" of the trial. This determination is grounded upon the finding that the Defendant, by this date, had remedied the discriminatory practices which gave rise to the instant litigation. Such a cut-off date, the Court finds, is in keeping with the principles enunciated in *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977). Although in *James, supra*, the Fifth Circuit examined the applicability of "front pay" awards in Title VII cases, the Court here finds that damages, calculated to the end of "phase I" of the trial, plus interest, is analogous to placing the discriminatee in his "rightful place."

In a Title VII trial it is the complainant who must carry the initial burden of establishing a prima facie case of discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973). This burden has been met by each named plaintiff. The burden then shifts to the prospective employer to persuade the Court that the failure to hire the individual was based upon non-discriminatory grounds. *Id.*

The court finds from the evidence presented that the defendant's method of accepting and acting upon applications for employment while not in itself discriminatory, exacerbated the extant discriminatory practices of the Defendant.

Unrebutted evidence was presented that applicants seeking employment were never told what jobs were available at the time of their application. This practice led many of the plaintiffs to apply for "anything" rather than select a possible second position. Similarly, absent information of available positions, the applicants had no idea what skills the defendant deemed essential for employment. Although the defendant had a policy of keeping applications "active" for a 90 day period, this information was never communicated to these minority applicants at the time they tendered their applications. Thus, applicants who believe they would be considered for a job whenever an opening developed, learned at trial that the defendant had placed their application in an inactive file 90 days after its submission.

Because the defendant failed to give plaintiffs notice of the types of jobs available, failed to communicate to these applicants what qualifications were necessary, and failed to inform any plaintiff that his application would be "retired" after 90 days, the Court finds that under the facts of this case it is the defendant and not the plaintiff who must carry the burden of proof on the issue of job availability.

The Court further finds from the evidence that the defendant, when it offered any proof, offered proof of job availability only for the 90 day period subsequent to the applicant's tendering of his application.

The Court finds that the information described above was peculiarly within the knowledge of the defendant and though requested by plaintiff's counsel was never provided the opposing party. Thus, as Mr. Justice Powell

noted in *McDonnell Douglas, supra*, the "prima facie proof required . . . is not necessarily applicable . . . to differing factual situations." *Id.* at 802 n. 13, 93 S.Ct. at 1824. The Court finds the instant case to be one such "differing factual situation" warranting a shifting of the burden of proof on the issue of job availability. Thus when the defendant has failed to bring forth evidence of job nonavailability after the 90 day period, the Court has awarded damages as if a job was available on the 91st day.

Findings of Fact

CASTILLO, JOSE R.

Mr. Castillo, thirty-four years old, applied for a Field Inspector's position at General Telephone on July 16, 1973. The Court finds, by the evidence presented, that no field inspector's position was available during the three months in which Mr. Castillo's application was "active." Because there is no evidence that a Field Inspector's position was not available after the three month period, the Court has determined that back wages should be granted from the first day after the three month period to the end of "phase I" of the trial. Actual Earnings have also been calculated on the basis of these dates. Plaintiff's rate of pay is based upon information supplied by both Plaintiff and Defendant. Where the parties disagreed, the Court has averaged their data to arrive at a satisfactory rate of pay.

CERDA, MARIA

Mrs. Cerda applied for a clerk's position or any position at General Telephone on August 11, 1974. Although, by the evidence presented, General Telephone hired three clerks during the three month period in which Mrs. Cerda's application was "active", the Court finds that the people hired were more qualified for the clerks's position than Mrs. Cerda who was unable to type and would

begin typing lessons in September, 1974. Because there is no evidence that a clerk's position or any other position was not available after Mrs. Cerda's "active" period, the Court has determined that back wages should be granted from the first day after the three month period to the end of "Phase I" of the trial. Plaintiff's rate of pay was based upon data presented in General Telephone's collective bargaining agreement dated June 16, 1974, Appendix B-4. This is the pay structure for an entry level clerk in the Irving facility.

ESQUIVEL, PEDRO JUAN

Mr. Esquivel applied for an electronic technician's position or any position at General Telephone on October 6, 1975. The defendant put forth evidence that during the "active" period of Mr. Esquivel's appliction one frameman's position became available. This position was filed by Milton Johnson, an ex-employee of General Telephone's Irving facility. The Court finds that Mr. Johnson was better qualified than Mr. Esquivel for the position of frameman. There is little or no evidence however, that a position was or was not available after the application of Mr. Esquivel was no longer "active", *see* defense exhibit 53, and therefore the Court has granted damages from the first day after the three month period until the end of "phase I" of the trial. The parties have disagreed on the proper rate of pay for Mr. Esquivel. Defendant relies on data presented in Appendix E-3 of the 1974 Collective Bargaining Agreement reserved for Frameworkers and Helpers (entry level position). *See Appendix* E-18. Plaintiff has classified Mr. Esquivel in the highest "Service & Engineering-Construction Workers" category. *See* Appendix E. The Court has resolved this controversy by placing Mr. Esquivel in Group III, one step above entry level for his entire operative period. See Appendix E-2.

FLORES, ARMILDA

Ms. Armilda Flores, age twenty-three, applied for a general clerk's position or a position at the "repairment" (sic) department of General Telephone on June 26, 1974. Evidence was presented that the defendant hired a number of people during the "active" period of Ms. Flores application. *See* defense exhibit 19. All applicants, the Court finds, were better qualified than Ms. Flores except one. As for applicant Barbara Toliver, *See* defense exhibit 19 (third applicant at pp. 1-2) the defense presented oral testimony that Toliver had "shown a desire to learn." The Court finds this evidence insufficient to deny Ms. Flores a position. The Court also finds defendant's characterization of Ms. Toliver equally applicable to Ms. Flores. The Court has therefore calculated Plaintiff's damages from the date of application through the end of "phase I" of the trial. Defendant also argues that plaintiff has overstated Ms. Flores potential earnings at the Irving facility by opting for a rate of pay higher than she deserves. The Court has placed Ms. Flores in Appendix B-4, the entry level for clerks at the Irving facility.

GARCIA, FLORIA

Ms. Garcia applied for either an operator's or clerk typist's position at General Telephone on October 15, 1974. At the time of her application, Ms. Garcia could type fifty words per minute. Although defendant put forth evidence that no full-time positions were available from October 1974 to May 1975, plaintiff countered by showing that some individuals were hired, including certain part-time positions. The Court has therefore calculated plaintiff's damages from three months after her date of application through "phase I" of the trial. Evidence was presented, however, that Ms. Garcia worked only part-time for some four years after her application to defendant. This decision was her own choice. The

Court has therefore granted plaintiff only part-time employee's wages for the entire operative period. Part-time wages are calculated on the basis of twenty hours per week. This determination appears to parallel Ms. Garcia's actual work record during this same period.

GARZA, DIANA

Ms. Garza applied for an office clerk's position, a teller's position or a service representative's position at General Telephone on August 14, 1974. One person was hired during the active period of plaintiff's application. There is no evidence whether this person was better qualified than Ms. Garza but by her application it is clear that Ms. Garza had no typing or shorthand skills at the time of her application. The Court has computed Ms. Garza's damages from three months after her date of application through "phase I" of the trial and has classified Ms. Garza as an entry level clerk. *See* Appendix B-4.

GUZMAN, ANICETO DIAZ

Mr. Guzman applied for a Lineman's position or "whatever was available" at General Telephone's Irving facility on September 16, 1974. He stated in his application that he was not available until December of that year. The Court has therefore calculated Mr. Guzman's damages from December 1, 1974 through "phase I" of the trial. The parties has disagreed on the proper rate of pay for Mr. Guzman had he been employed at defendant's Irving facility. The Court finds that a "Lineworker's position". *See* Appendix E-2, is the appropriate classification and damages have been calculated accordingly.

LONGORIA, JUAN J.

Mr. Longoria applied for a Lineman's position with General Telephone on April 30, 1973. Although there is no testimony whether a Lineman's position became avail-

able, the Court has determined under existing precedent that the earliest date for which backpay can lawfully be awarded is August 23, 1973. Thus, the Court has computed Mr. Longoria's damages from August 23, 1973, through the end of "phase I" of the trial. Further, the Court has classified Mr. Longoria as a Lineman in Group III. *See* Appendix E-18.

LOPEZ, ROBERT ALFRED

Mr. Lopez applied to General Telephone on July 24, 1974, for a Phone Installer's position or "any position." In his application, Mr. Lopez expressed his willingness to work nights, Saturdays, Sundays, and Holidays. Evidence was presented that no Installer's position opened during the pendency of Mr. Lopez' application. The Court has therefore calculated Mr. Lopez' damages from three months after his application through "phase I" of the trial.

Although Plaintiff classified Mr. Lopez as a Group II employee throughout this period, *See* Plaintiff's Exhibit 9, the Court finds that Mr. Lopez is more properly classified as a Group IV employee (entry level status) during the first six months of his employment and then as a Group I employee thereafter so as to account for the necessary training required of new employees. Further, an additional adjustment has been made to Mr. Lopez' actual earnings to account for the use of an apartment during twelve months of the operative period. On the basis of testimony presented, the Court has valued the use of the apartment at $125.00 per month. No adjustment has been made for Mr. Lopez' use of an automobile on the grounds that such use does not amount to income and was provided by the employer for the employer's business purposes.

LYSHOL, MARTHA

Ms. Lyshol applied for a cashier's position, a clerk's position, an operator's position or "any position" at

General Telephone on October 8, 1975. Defendant put forth evidence that plaintiff was not hired because she did not possess the skills necessary to operate a "ten-key" adding machine. This was so, the defendant argues, even though Ms. Lyshol was able to type thirty-five words per minute. Further, the defendant states that Ms. Lyshol refused to work on Sundays therefore making her ineligible for certain other positions for which she was qualified. On Ms. Lyshol's appliction it is clear that she was available on nights, Saturdays and holidays.

The Court finds the defendant's grounds for denying Ms. Lyshol employment to be illusory and has therefore calculated her damages from the day after her application. Further, the Court has classified Ms. Lyshol as an entry level clerk under the 1974 Collective Bargaining Agreement governing pay scales at General Telephone's Irving facility. *See* Appendix B-4.

MARES, STEVEN

Mr. Mares applied at General Telephone on July 23, 1976, for an Installer Repairmen's position or a Frameman's position. Plaintiff testified, and the Court finds credible, that plaintiff, like all other plaintiffs here, was never told of an "active" period nor that the defendant "retired" an application after 90 days. Further, the defendant put forth no evidence regarding the availability (or nonavailability) of the position during the pendency of Mr. Mares' application. The Court has therefore calculated damages for Mr. Mares beginning one day after his application and extending through the end of "phase I" of the trial. The Court has classified Mr. Mares as an Installer Repair Person (Group II; Appendix E-1) based upon his prior experience with Mountain Bell as an Installer Repair Person. Further, because Mr. Mares held two jobs during the period of 7-24-76 to 8-6-76, the Court has awarded Mr. Mares overtime wages equaling eighty hours during that same period. This, the Court

finds, is the only equitable manner of resolving Mr. Mares potential earnings, vis-a-vis his actual earnings for the same period. It must be noted, however, that no overtime wages beyond the above period have been granted by the Court for Mr. Mares.

ORTIZ, HERMALINDA

Ms. Ortiz applied to General Telephone on March 19, 1974, for a Clerical Trainee's position. Defendant, through testimony by Edda Bates, presented evidence that eleven positions existed while plaintiff Ortiz' application was active. Defendant further elicited testimony that the necessary qualifications for these positions varied but the plaintiff must have been able to; work nights, operate a "ten-key" adding machine, or have a sales or a clerical background. The Court finds the defendant's grounds for denying Ms. Ortiz employment to be without foundation. The skills necessary to operate a "ten-key" adding machine were certainly within Ms. Ortiz' capabilities and the training period would not have been so onerous as to preclude the defendant from hiring her. The Court has therefore calculated Ms. Ortiz' damages from the day after her application through the end of "phase I" of the trial. The Court has classified Ms. Ortiz as an entry level clerk. *See* Appendix B-4.

SANCHEZ, RAMON S.

Mr. Sanchez applied to General Telephone on June 21, 1974, as a maintenance or labor trainee. Defendant presented evidence that no jobs, of the type Mr. Sanchez applied for, were available during the pendency of Mr. Sanchez' application. The Court has therefore calculated damages from the first day after Mr. Sanchez' application was no longer active. The Court further finds that, notwithstanding the testimony, Mr. Sanchez was never a full-time student and has therefore calculated damages

for the entire period. The testimony regarding Mr. Sanchez' studies included a statement that he was a full-time student at Tarrant County Junior College, a full-time student at University of Texas at Arlington, and a full-time employee as a porter at the Dallas-Fort Worth Airport. His status as a student and employee supposedly occurred at the same time. Due to Mr. Sanchez' condition (Parkinson's disease) the Court has made every effort to reconstruct this period in his life from testimony, interrogatories presented to the Court and his work record. Because Mr. Sanchez received unemployment compensation during eleven months of the operative period, the Court considers such compensation to be in lieu of compensation he would have earned had he been employed. Therefore, Mr. Sanchez' unemployment compensation has been included in his actual earnings. The Court has not altered Mr. Sanchez' income because of his debilitating disease. The Court reaches this conclusion on the grounds that Mr. Sanchez continued in gainful employment through the operative period determined by this Court.

FALCON, MARIANO S.

Mr. Falcon was hired by General Telephone on July 7, 1969, pursuant to a program devised to employ unemployed minorities. The Court has previously found that there was no evidence of discrimination against Falcon in hiring. Falcon was employed by General Telephone as a Ground Worker, after 30 days he was promoted to Line Worker and subsequently to Line-Worker-In-Charge by the end of his first year. He received no further promotion prior to the time he sought a promotion to Field Inspector on October 8, 1972. The Court finds that at that time he was discriminated against, 4 other men, not Mexican-Americans, with less seniority than Falcon, had been promoted over him. His potential earnings have therefore been calculated on the basis of the position Field Inspector.

Mr. Falcon voluntarily refused a promotion to Installer Repairman at General Telephone in 1970, and in 1972 he voluntarily stepped down from Lineman-In-Charge to Lineman. Because of Mr. Falcon's refusal to accept a promotion and in stepping down, these actions have been considered in the determination of his actual wages. Since he was employed by General Telephone during the entire time for which damages have been awarded, the additional amount has not been included for job security, interest, however, has been included.

Attorneys' Fees

In "phase I" of this trial, it was determined that plaintiff, Mariano S. Falcon for himself and the class he represents, was entitled to recover attorneys fees. The attorneys working on the case were Frank Hernandez, John Collins, and law clerk George Solares. A paralegal clerk Lynn Drake also worked on the case.

A reasonable fee for attorneys is $80.00 an hour. Frank Hernandez spent 182 hours in preparation, making his fee $14,560.00. John Collins spent a total of 112 hours in preparation, making his fee $8,960.00. A reasonable fee for a law clerk is $25.00 an hour. George Solares spent 89.5 hours in preparation as a law clerk making a total fee of $2217.50. A reasonable fee for a Junior Attorney is $60.00 an hour. George Solares, after he was admitted to the bar, spent 36.5 hours, making a total fee of $2190.00. A reasonable fee for a paralegal clerk is $20.00 an hour. Lynn Drake, a paralegal working for John Collins spent 45 hours in paralegal work, making a total fee of $900.00. Mariano S. Falcon for himself and for the class he represents is entitled to recover a total of $28,827.50 for legal services.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

FINAL JUDGMENT

After full and impartial consideration of the above entitled and numbered cause, the Court, based on the Findings of Fact and Conclusions of Law rendered on March 22, 1977, and the Findings of Fact and Conclusions of Law contained in this Court's Order dated October 20th, 1978, renders final judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

That final judgment of this action be entered in favor of Mariano S. Falcon and the class which he represents against General Telephone Company of the Southwest in the amount of $67,925.49 together with interest accruing hereafter from the date of final judgement.

Dated this 20 day of October, 1978.

/s/ Sara T. Hughes
United States District Judge

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3587

D.C. Docket No. CA 3-75-0403-B

MARIANO S. FALCON,
Plaintiff-Appellee
Cross-Appellant,

versus

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Defendant-Appellant
Cross-Appellant,

Appeal from the United States District Court for the Northern District of Texas

Before TUTTLE, RANDALL and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; and that this cause be, and

the same is hereby remanded in part to the District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear his own costs on appeal in this Court.

September 22, 1980

Issued as Mandate: Oct. 14, 1980.

Reissued as Mandate: Nov. 5, 1980.

A true copy
Test

Clerk
U.S. Court of Appeals
Fifth Circuit

By /s/ Brenda Hauck
Deputy
New Orleans, Louisiana

APPENDIX L

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

October 27, 1980

GILBERT F. GANUCHEAU
Clerk

TEL 504—589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 78-3587—MARIANO S. FALCON v.
GENERAL TELEPHONE CO.
OF THE SOUTHWEST

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU
Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: Mr. Stephen W. Holt
Mr. John E. Collins
Mr. Frank P. Hernandez
Mr. E. Russell Nunnally

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-3587

MARIANO S. FALCON,
Plaintiff-Appellee
Cross-Appellant,

versus

GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST,
Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Texas

---

July 17, 1981

O R D E R

IT IS ORDERED that appellant's motion for recall and stay of the issuance of the mandate for a period of thirty days from the date of this order is denied.

/s/ Carolyn Dineen Randall
United States Circuit Judge

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-3587

MARIANO S. FALCON,
Plaintiff-Appellee
Cross-Appellant,

versus

GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST,
Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(June 23, 1981)

Before TUTTLE, RANDALL and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen Randall
United States Circuit Judge

APPENDIX O

U.S. Constitution, Amend. V, Due Process Clause:

No person shall . . . be deprived of life, liberty or property, without due process of law.

Fed. R. Civ. P. 23(a):

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(b)(2):

> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

Joint Appendix

Office - Supreme Court, U.S.
FILED
JAN 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner

v.

MARIANO S. FALCON,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

THOMPSON POWERS *
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* Counsel of Record

PETITION FOR CERTIORARI IN NO. 81-574 FILED
SEPTEMBER 21, 1981
CERTIORARI GRANTED DECEMBER 7, 1981

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Order, Computations (October 20, 1978)	237
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NOTICE

The following opinions, orders and judgments have been omitted in printing this appendix because they appear on the following pages in the printed Appendix to the Petition for certiorari in No. 81-574, which is incorporated herein by reference:

Item	Page in Appendix to Petition for Certiorari in No. 81-574
Pre-Trial Order (February 2, 1976)	48a
Order, March 11, 1976	50a
Findings and Conclusions, March 22, 1977	34a
Judgment, March 22, 1977	46a
Order, October 20, 1978	53a
Final Judgment, October 20, 1978	63a
Order, October 31, 1978	52a
Judgment, September 22, 1980	66a
Opinion of Fifth Circuit, September 22, 1980	4a
Order denying petition for rehearing, October 27, 1980	68a
Opinion of Fifth Circuit on Remand, May 29, 1981	1a
Order denying petition for rehearing, June 23, 1981	70a
Order of Fifth Circuit on petition for rehearing, June 24, 1981	3a
Order denying motion for stay of issuance of mandate, June 17, 1981	69a

Certificates of service whenever appended to documents herein has been omitted in printing.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CCA3-75-0403-B

[Title Omitted in Printing]

EXCERPTED DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1975		
Apr 3	1	Filed COMPLAINT and issued SUMMONS (1).
Apr 25	6	Filed Defendant's ORIGINAL ANSWER.
May 5	9	Filed Defendant's FIRST SET OF INTERROGATORIES TO PLAINTIFF.
Aug 27	22	Filed PRE-TRIAL ORDER—set for trial 10-14-75 Cys mld to counsel
Sep 4	23	Filed PLAINTIFF'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES
Sep 15	32	Filed PLAINTIFF'S FIRST SET OF INTERROGATORIES.
Oct 8	40	Filed Pla's MOTION FOR CONTINUANCE.
Oct 8	45	Filed PLAINTIFF'S BRIEF IN SUPPORT OF HIS CLASS ACTION.
1976		
Feb 2	52	Filed PRE-TRIAL ORDER—case to proceed as a class action, plaintiff to represent the class. Set for trial March 15, 1976 at 9:30 A.M. Cys mld to counsel.

DATE	NR.	PROCEEDINGS
1976		
Feb 3	53	Filed DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES with exhibits. (Original pleading misplaced-cy furnished by Atty. Nunnally). "R" (EXHIBITS UNDER SEPARATE COVER)
Feb 20	95	Filed Deft. MOTION TO RECONSIDER CERTIFICATION OF A CLASS
Feb 20	97	Filed Defts' BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO RECONSIDER CERTIFICATION OF A CLASS
Mar 11	146	Filed ORDER—Motion to Compel granted, the Defendant shall supply answers to Plaintiff's Interrogatories as far back as Defendant's records go and for the dates on which the Defendant has records; the Motion to Reconsider Certification of a Class is DENIED and this action shall proceed as a class action; reset for trial on April 19, 1976. Cys mld to counsel.
Mar 8	147	Filed PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO RECONSIDER CERTIFICATION OF A CLASS.
Mar 8	148	Filed PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO RECONSIDER CERTIFICATION OF A CLASS.
Apr 7	156	Filed DEFENDANT'S SUPPLEMENTAL ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES with Attachments.
Oct 7	164	Filed Defendant's TRIAL BRIEF.
Oct 21	173	Filed Plaintiff's TRIAL BRIEF.
Oct 21		Court Trial—10-21, 22 & 26-76.

DATE	NR.	PROCEEDINGS
1976		
Nov 22	179	Filed DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.
Nov 23	195	Filed Defendant's LETTER BRIEF. (Attachments)
Dec 7	204	Filed Plaintiff's MOTION TO AMEND THE CLASS.
Dec 7	206	Filed PLAINTIFF'S MOTION TO HAVE MASTER APPOINTED.
Dec 7	208	Filed Plaintiff's PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW. (Attachments)
Dec 14	259	Filed DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.
Dec 15	273	Filed Defendant's RESPONSE TO POST TRIAL MOTIONS.
1977		
Mar 22	282	Filed FINDINGS AND CONCLUSIONS Copies to counsel by Judge Hughes' Office.
Mar 22	293	Filed ORDER RE MOTION TO AMEND CLASS—Denied. Copies to counsel by Judge Hughes' Office.
Mar 22	294	Filed JUDGMENT based on the Court's Findings and Conclusions—Defendant, General Telephone Company of the Southwest is ORDERED to: 1. pay Mariano S. Falcon compensation for discrimination as may hereafter be found by this Court; 2. pay the class, represented by Mariano S. Falcon, compensation for discrimination, as may hereafter be found by this Court; 3. pay the attorney for Falcon and the class he represents, an

DATE	NR.	PROCEEDINGS
1977		
		attorney fee as may hereafter be determined by this Court. Defendant, General Telephone Company of the Southwest, is directed within 30 days to prepare and file an amended affirmative action program containing the elements contained in the Court's Conclusions of Law pertaining to the class. Costs against Defendant. Copies to counsel by Judge Hughes' Office.
Mar 30	295	Filed Defendant's MOTION FOR NEW TRIAL. (Exhibit attached)
Mar 30	303	Filed Defendant's MOTION TO AMEND FINDINGS AND CONCLUSIONS. (Exhibit attached)
Mar 30	311	Filed Defendant's MOTION TO ALTER OR AMEND THE JUDGMENT. (Exhibit attached)
Apr 11	318	Filed Defendant's BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL.
Apr 11	334	Filed Defendant's MOTION TO STAY THE JUDGMENT.
Apr 13	336	Filed ORDER STAYING THE JUDGMENT pending the determination of Defendant's post-trial motions and, if an appeal is taken, pending the appeal of this cause of action. Copies mailed to counsel.
1978		
Feb 13	337	Filed PLAINTIFF'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW.
Feb 13	340	Filed PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

DATE	NR.	PROCEEDINGS
1978		
Mar 20	344	Filed DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW.
Mar 27	350	Filed ORDER that Plaintiff's Motion to Amend Findings of Fact and Conclusions of Law is DENIED. Cys. to counsel.
Apr 6	351	Filed PRE-TRIAL ORDER—a pre-trial conference will be held June 8, 1978 at 11:00 A.M. A trial on the merits of the claim of each member of the class who responds to the notice to the claim by May 19, 1978, . . . will be held June 26, 1978. Plaintiff and defendant are ordered to continue settlement negotiations. Cys. to counsel.
Apr 21	353	Filed Pltf's MOTION TO APPROVE NOTICE TO CLASS with attached Exhibit.
May 1	359	Filed ORDER on Plaintiff's Motion to Approve Notice to Class . . . . Proposed notice approved. Plaintiff is to proceed with the issuance of this notice by means of written correspondence, newspaper advertisement and radio advertisement. Cys. to counsel
May 3	360	Filed PRE-TRIAL ORDER—each member of the Class will have until Friday, June 2, 1978, within which to respond to the Notice to be issued by Plaintiff—Defendant will serve interrogatories on the Class, through its attorney, no later than Friday, June 2, 1978. Each member of the class who intends to present a claim must respond no later than June 23, 1978. A Pre-trial Conference will

DATE	NR.	PROCEEDINGS
1978		
		be held at 11:00 a.m. June 29, 1978. Discovery must be completed by Friday, June 30, 1978. Trial July 10, 1978. Cys. to counsel.
June 1	361	Filed DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS.
June 1	363	Filed DEFENDANT'S FIRST SET OF INTERROGATORIES TO MEMBERS OF CLASS.
June 23	372	Filed Plaintiff-member Steven Jerry Maresos ANSWERS TO INTERROGATORIES. (Unsigned).
June 23	382	Filed Plaintiff-member Gloria Llanes Garcia's ANSWERS TO INTERROGATORIES.
June 23	391	Filed Plaintiff-member Juan Jose Longoria's ANSWERS TO INTERROGATORIES.
June 23	400	Filed Plaintiff-member Martha Vela Lyshol's ANSWERS TO INTERROGATORIES.
June 23	409	Filed Plaintiff-member Maria Vela Cerda's ANSWERS TO INTERROGATORIES.
June 23	418	Filed Plaintiff-member Armilda Flores's ANSWERS TO INTERROGATORIES.
June 23	428	Filed Plaintiff-member Jose Roberto Castillo's ANSWERS TO INTERROGATORIES.
June 23	437	Filed Plaintiff-member Diana Estella Garza's ANSWERS TO INTERROGATORIES.
June 23	447	Filed Plaintiff-member Aniceto Diaz Guzman's ANSWERS TO INTERROGATORIES.
June 23	457	Filed Plaintiff-member Hermalinda Ortiz's ANSWERS TO INTERROGATORIES.

DATE	NR.	PROCEEDINGS
1978		
June 23	468	Filed Plaintiff-member Robert Alfred Rodriguez Lopez's ANSWERS TO INTERROGATORIES.
June 23	478	Filed Plaintiff-member Pedro Juan Esquivel's ANSWERS TO INTERROGATORIES.
July 6	488	Filed Plaintiff-member Steven Jerry Mares's ANSWERS TO INTERROGATORIES.
July 6	498	Filed Defendant's MOTION TO COMPEL ANSWERS TO INTERROGATORIES.
July 6	501	Filed Defendant's BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL.
July 12	506	Filed Plaintiff-member Ramon Sanchez Sanchez's ANSWERS TO INTERROGATORIES.
Sept 19		Court Trial September 19, 20 and 21.
Sept 29	515	Filed DEFENDANT'S POST TRIAL BRIEF.
Oct 2	529	Filed PLAINTIFF'S POST-TRIAL BRIEF.
Oct 20	550	Filed ORDER after Court trial—judgment having been filed on March 22, 1977, after court trial—granting awards to class totaling $39,097.99 and attorneys' fees totaling $28,827.50 to Mariano S. Falcon for himself and for the class he represents. Cys. to counsel by Judge Hughes' Office.
Oct 20	585	Filed FINAL JUDGMENT in favor of Mariano S. Falcon and the class which he represents against General Telephone Company of the Southwest in the amount of $67,925.49 together with interest accruing hereafter from the date of final judgment. Cys. to counsel.

DATE	NR.	PROCEEDINGS
1978		
Oct 30	586	Filed DEFENDANT'S FIRST AMENDED MOTION TO ALTER OR AMEND THE FINAL JUDGMENT OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL. (order to judge).
Oct 30	594	Filed BRIEF IN SUPPORT OF DEFENDANT'S FIRST AMENDED MOTION TO ALTER OR AMEND THE FINAL JUDGMENT OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL.
Oct 30	610	Filed Plaintiff's MOTION FOR NEW TRIAL.
Oct 30	612	Filed PLAINTIFF'S BRIEF IN SUPPORT OF HIS MOTION FOR NEW TRIAL.
Oct 31	620	Filed ORDER—Defendant's First Amended Motion to Alter or Amend the Final Judgment or in the Alternative Motion for New Trial is DENIED. Cys. to counsel.
Oct 31	621	Filed ORDER—Plaintiff's Motion for New Trial is DENIED. Cys. to counsel.
Nov 20	622	Filed Deft's NOTICE OF APPEAL from the Findings and Conclusions and the Judgment regarding liability and injunctive relief entered March 22, 1977, the Order regarding back wages and attorney fees, and the Final Judgment entered October 20, 1978, and the Order overruling Defendant's First Amended Motion to Alter or Amend the Final Judgment of in the Alternative Motion for New Trial entered October 31, 1978. Cy to Notice with cy of docket entries to Court of Appeals Cy to Court Reporter Carl Black & Jerry Calloway
Nov 20	624	Filed Deft's BOND FOR COSTS. (Appeal Bond).

DATE	NR.	PROCEEDINGS
1978		
Nov 29	628	Filed Plaintiff's NOTICE OF CROSS-APPEAL from the Final Judgment entered on 20th day of October, 1978; the Order entered on the 31st day of October, 1978; and the Order entered on the 22nd day of March, 1977. Cy of Notice with cy of docket entries to Court of Appeals Cy to Court Reporter Carl Black & Jerry Calloway
Nov. 29	629	Filed Plaintiff's CROSS-APPEAL BOND.
1979		
Jan 4	632	Filed ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL from January 8, 1979 to February 25, 1979. Cys. to Attorneys of Record and 5th Circuit.
Jan 5	"C"	Filed TRANSCRIPT of PROCEEDINGS on October 21, 1976. (1 vol.) with Exhibits as submitted by Court Reporter. (Jerry Calloway Court Reporter) PV-C-1 DJ-C-2
Feb 23	"D"	Filed TRANSCRIPT OF PROCEEDINGS beginning September 18, 1978 and continuing through September 19, 1978 with Exhibits as submitted by Court Reporter. (Court Reporter Carl Black). PV-D-1 DJ-D-2
Feb. 26		Mailed Original Case papers (2 Vols.), Transcript of Proceedings (2 Vols.). Exhibits (Pltf's Exhibits 2 envelopes) (Deft's Exhibits 2 envelopes) to Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3587

[Title Omitted in Printing]

EXCERPTED DOCKET ENTRIES

Date	Proceedings
1979	
Jan. 8	Order of district court extending time to file record until 2-25-79.
Feb. 28	Record on Appeal, including exhibits, filed.
Mar. 3	Supplemental Record on Appeal filed.
Apr. 4	Appellant's brief filed.
Apr. 20	Excerpt of record filed.
May 11	Order granting Appellee's motion for an extension, until 5-23-79, to file brief.
May 21	Order granting Appellee's motion for an extension, until 5-30-79, to file brief.
June 6	Appellee's brief filed.
June 6	Order granting Appellant's motion for an extension, until 6-25-79, to file reply brief.
June 27	Appellant's reply brief filed.
July 7	Appellant's letter dated 7-18-79, re case cited in reply brief, filed.
Aug. 8	Appellant's first supplemental authority filed.
Dec. 12	Appellant's second supplemental authority filed.

Date	Proceedings
1980	
Jan. 28	Appellant's letter dated 1-25-80, citing recent court decisions, filed.
Feb. 25	Appellee's letter dated 2-21-80, citing recent court decisions, filed.
Mar. 28	Case assigned to a panel, and scheduled to be heard 5-12-80.
May 12	Oral argument. Both parties, appellant and appellee, present oral arguments.
July 7	Appellant's letter dated 7-3-80, citing additional authority, filed.
July 18	Appellant's letter dated 7-16-80, citing additional authority, filed.
Aug. 27	Appellant's supplemental authority filed.
Sept. 22	Opinion rendered, affirming in part, and reversing and remanding in part.
Oct. 6	Appellant's petition for a rehearing *en banc* filed.
Oct. 27	Order denying appellant's petition for a rehearing *en banc*.
1981	
Feb. 5	Notice that certiorari petition filed with the Supreme Court on 1-26-81.
Apr. 9	Supreme Court Order of 4-6-81 granting the writ of certiorari, vacating the decision of the Court of Appeals, and remanding the case to the Court of Appeals for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089 (1981) received.
May 6	Case reported reopened to the administrative office of the federal courts.

Date	Proceedings
1981	
May 6	Supreme Court judgment received.
May 21	Appellant's letter dated 5-19-81, re taxing of Supreme Court costs, filed.
May 29	Opinion, on remand from the Supreme Court, rendered. Case remanded.
Sept. 21	Notice that certiorari petition filed with the Supreme Court on 9-21-81.
Dec. 9	Supreme Court Order, granting the writ of certiorari filed on 9-21-81, received.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA 3-75-0403-B

MARIANO S. FALCON,
Plaintiff,

VS

GENERAL TELEPHONE COMPANY,
Defendant.

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

I.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343(4); 42 U.S.C. Section 2000e-5(f); and 28 U.S.C. Sections 2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as the "Civil Rights Act of 1964", 42 U.S.C. Section 2000e *et seq.* The jurisdiction of this Court is invoked to secure protection of and to reduce deprivation of rights secured by (a) 42 U.S.C. Section 2000e *et seq.* providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. Section 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States.

II.

The plaintiff brings this action on his own behalf and on behalf of other persons similarly situated, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class which the Plaintiff represents is composed of Mexican-American persons who are employed, or who might be employed, by GENERAL TELEPHONE

COMPANY at its place of business located in Irving, Texas, who have been and who continue to be or might be adversely affected by the practices complained of herein. There are common questions of law and fact affecting the rights of the members of this class who are, and who continue to be, limited, classified, and discriminated against in ways which deprive and/or tend to deprive them of equal employment opportunities and which otherwise adversely affect their status as employees because of national origin. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by Plaintiff. Defendant has acted or refused to act on grounds generally applicable to the Plaintiff.

III.

This is a proceeding for declaratory judgment as to the Plaintiff's rights and for a preliminary and permanent injunction, restraining Defendant from maintaining a policy, practice, custom, or usage of: (a) discriminating against Plaintiff and other Mexican-American persons in this class because of national origin and with respect to compensation, terms, conditions, and privileges of employment, and (b) for subjecting the Plaintiff and other Mexican-American persons in this class to continuous employment discrimination.

IV.

Plaintiff, MARIANO S. FALCON, is a Mexican-American citizen of the United States and a resident of Dallas in the State of Texas. Plaintiff has been employed by Defendant, GENERAL TELEPHONE COMPANY, at its place of business in Irving, Texas.

V.

Defendant, GENERAL TELEPHONE COMPANY, is a corporation doing business in the State of Texas, and

in the City of Irving. The corporation is engaged in furnishing telephone service and is an employer within the meaning of 42 U.S.C. Section 2000e-(b).

VI.

All matters regarding compensation, terms, conditions, and privileges of employment of the Plaintiff and the class he represents have been, at all times material to this action, governed and controlled by the company exclusively, even though the employees are represented by Local No. 12179 of the Communications Workers of America, AFL-CIO. The Defendant has established an employment, transfer, promotional, and seniority system, the design, intent, and purpose of which is to continue and preserve, and which has the effect of continuing and preserving, the Defendant's policy, practice, custom and usage of limiting the employment, transfer, and promotional opportunities of Mexican-American employees of the company because of national origin.

VII.

Plaintiff, MARIANO S. FALCON, was hired by GENERAL TELEPHONE COMPANY as a groundsman in July of 1969. The following month Plaintiff was promoted to lineman, and on October 31, 1969, the Plaintiff was promoted to lineman in charge, a position which he still holds. Plaintiff alleges that Anglo employees hired at the same time or subsequent to Plaintiff's employment have been promoted more rapidly than the Plaintiff and that Anglos less qualified with less experience and with lower evaluation scores have been promoted over the Plaintiff. Plaintiff maintains that the unequal employment and promotional practices of the Defendant are a direct result of the Defendant's unlawful and discriminatory policy towards Mexican-Americans.

VIII.

The effect, purpose, and intent of the policies and practices pursued by the Defendant has been and continues to be to limit, segregate, classify, and discriminate against Mexican-American workers at GENERAL TELEPHONE COMPANY is ways which jeopardize their jobs and tend to deprive the said Mexican-American workers of employment opportunities and which otherwise adversely affect the status of employees because of their national origin.

IX.

On October 17, 1972, within ninety (90) days of the occurance of the acts of which he complains, Plaintiff, MARIANO S. FALCON, filed written charges, under oath, with the Equal Employment Opportunity Commission alleging denial by Defendant of Plaintiff's rights under Title VII of both the "Civil Rights Act of 1964, as amended", and 42 U.S.C. Section 2000e, *et seq.* The commission forwarded to Plaintiff, MARIANO S. FALCON, a Notice-of-Right-to-Sue within 90 Days, advising Plaintiff that he had 90 days from the receipt of said notice to file suit at the appropriate Federal District Court pursuant to Section 706(f)(1) of the Civil Rights Act of 1964, as amended. Neither the State of Texas nor the City of Irving has a law prohibiting the unlawful employment practices alleged herein.

WHEREFORE, Plaintiff respectfully prays this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and upon hearing to:

(1) grant the Plaintiff and the class he represents a permanent injunction enjoining the Defendant, GENERAL TELEPHONE COMPANY, its agents, successors, employees, attorneys and those acting in concert with it and at its direction from continuing or maintaining the policies, practices, customs and usages of denying, abridg-

ing, withholding, conditioning, limiting, or otherwise interfering with the rights of the Plaintiff and others similarly situated to enjoy the employment opportunities as are given by Title VII of the Act, as amended, known as the "Civil Rights Act of 1964", 42 U.S.C. Section 2000e, *et seq.*, and 42 U.S.C. Section 1981, without discrimination on the basis of race, color, sex, or national origin; and

(2) grant the Plaintiff and the class he represents relief by requiring the Defendant to make whole, by appropriate back pay and other relief, all such individuals who have been adversely affected by the practices and policies herein complained of; and

(3) grant the Plaintiff his costs herein, including reasonable attorney's fees and other such additional relief as may appear to the Court to be equitable and just.

Respectfully submitted,

HERNANDEZ, INC.
UCC Tower, Second Floor
Dallas, Texas 75247
(214) 630-3683

By: /s/ Frank P. Hernandez
FRANK P. HERNANDEZ
Attorney for Plaintiff

[Filed: April 5, 1975]

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title omitted in Printing]

ORIGINAL ANSWER OF DEFENDANT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

For answer to the complaint of the Plaintiff in the above-entitled cause the Defendant, General Telephone Company of the Southwest (General Telephone), says:

First Defense

For its First Defense, General Telephone answers the allegations of the complaint seriatim:

1. General Telephone lacks sufficient information to either admit or deny the allegations in Paragraph I and for that reason denies same.

2. General Telephone denies the allegations of Paragraph II.

3. General Telephone denies the allegations of Paragraph III.

4. General Telephone lacks sufficient information to either admit or deny the allegations in Paragraph IV with respect to the Plaintiff's citizenship and residence and for that reason denies same. General Telephone admits the allegations of Paragraph IV that the Plaintiff is a Mexican-American employed by General Telephone in Irving, Texas.

5. General Telephone admits the allegations of Paragraph V but would show the proper name of the corporation to be General Telephone Company of the Southwest.

6. General Telephone denies the allegations of Paragraph VI, except that it admits its nonmanagement employees are represented by Local 12179 of the CWA, AFL-CIO.

7. General Telephone denies the allegations of Paragraph VII except that it admits the employment and promotion dates of the Plaintiff.

8. General Telephone denies the allegations of Paragraph VIII.

9. General Telephone lacks sufficient information to either admit or deny the allegations in Paragraph IX of the complaint and for that reason denies same.

Second Defense

10. Plaintiff's claims are barred by limitations.

Third Defense

11. Plaintiff has failed to state a cause of action under 42 U.S.C. Section 1981 in that Section 1981 is applicable only to race discrimination and Plaintiff's suit herein is grounded on alleged national-origin discrimination.

Fourth Defense

12. Plaintiff's claims are barred by laches.

Fifth Defense

13. This court lacks subject matter jurisdiction of Plaintiff's claims under 42 U.S.C. Section 2000e, *et seq.*, in that Plaintiff's charge filed with the Equal Employment Opportunity Commission alleged discrimination on the basis of national origin in respect to promotion. No charge of discrimination with respect to compensation, terms, conditions and privileges of employment which would affect Mexican-Americans as employees of General Telephone has ever been filed by the Plaintiff with the Equal Employment Opportunity Commission. This court

has no jurisdiction to consider any allegation of discrimination in the Plaintiff's complaint or to grant any relief thereon other than the allegation of discrimination made to the Equal Employment Opportunity Commission.

WHEREFORE, premises considered, General Telephone prays judgment that the complaint of the Plaintiff be dismissed with costs to General Telephone and for such other and further relief to which General Telephone may be entitled.

COKE & COKE
3600 First National Bank Building
Dallas, Texas 75200
214-741-3401

By: /s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
E. RUSSELL NUNNALLY

PRESTON, HOLT & GOODRUM
P. O. Box 1001
San Angelo, Texas 76901
915-949-9683

By: /s/ Stephen W. Holt
Attorneys for Defendant

[Filed April 25, 1975]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

FIRST SET OF INTERROGATORIES TO PLAINTIFF MARIANO S. FALCON

To: Mariano S. Falcon,
Plaintiff or
Frank P. Hernandez
Hernandez, Inc.
UCC Tower, Second Floor
Dallas, Texas 75247
Attorney for Plaintiff

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST, Defendant herein, requests that MARIANO S. FALCON, Plaintiff herein, answer the following interrogatories under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, and thereafter supplement such answers as required by Rule 26(e) of the Federal Rules of Civil Procedure:

A. As used herein, the term "document" shall mean any paper or other article or thing or film or microfilm which bears or contains any writing, printing or lettering, including typewriting, manuscript or other characters, however made.

B. As used herein, "General Telephone" shall mean General Telephone Company of the Southwest.

C. As used herein, all references to "you", "Plaintiff" or "Falcon" shall mean Mariano S. Falcon.

D. "Identify", when used in reference to an individual person or firm, means to state the full name and last known address and in addition to state an individual person's last known business position; when used in reference

to a document, means to state the author, date, type of document (e.g., letter, memorandum, telegram, chart, etc.), its present location and custodian, and any other means of identifying it; when used in reference to a transaction or occurrence, means to identify each person participating in any way, the place and time of any meeting or meetings involved, and the date of the transaction or occurrence. To the extent the document itself contains the requested information, its production is sufficient.

Interrogatory No. 1

With regard to the allegations contained in Paragraph VI of the complaint which state:

> "The Defendant has established an employment, transfer, promotional, and seniority system, the design, intent, and purpose of which is to continue and preserve, and which has the effect of continuing and preserving, the Defendant's policy, practice, custom and usage of limiting the employment, transfer, and promotional opportunities of Mexican-American employees of the Company because of national origin."

please:

(A) detail fully and completely the alleged employment system by which General Telephone is claimed to limit the employment opportunities of Mexican-American employees because of national origin;

(B) detail fully and completely the alleged transfer system by which General Telephone is claimed to limit the transfer opportunities of Mexican-American employees because of national origin;

(C) detail fully and completely the alleged promotional system by which General Telephone is claimed to limit promotional opportunities of Mexican-American employees because of national origin;

(D) detail fully and completely the alleged seniority system by which General Telephone is claimed to limit the employment, transfer and promotional opportunities of Mexican-American employees because of national origin;

(E) identify all persons who will be used by the Plaintiff as witnesses at the trial of the present action to attempt to prove the above-cited allegations of Paragraph VI of the complaint.

Interrogatory No. 2

With regard to the allegations contained in Paragraph VII of the complaint which state:

> "Plaintiff alleges that Anglo employees hired at the same time or subsequent to Plaintiff's employment have been promoted more rapidly than the Plaintiff and that Anglos less qualified with less experience and with lower evaluation scores have been promoted over the Plaintiff."

please:

(A) identify the Anglo employees who have been promoted more rapidly;

(B) identify Anglo employees with less qualification and experience who have been promoted over Plaintiff;

(C) identify each document which evidences the allegations that Anglos have been promoted more rapidly;

(D) identify each document which evidences the allegations that Anglos less qualified with less experience and lower evaluation scores have been promoted over Plaintiff;

(E) identify all representatives of General Telephone who are claimed to have actually par-

ticipated in the alleged discrimination against Plaintiff;

(F) identify the persons who will be used by Plaintiff as witnesses at the trial of the present action to attempt to prove the above-cited allegations of Paragraph VII of the complaint.

Interrogatory No. 3

With regard to the allegations of Paragraph VIII of the complaint, please:

(A) identify the Mexican-American workers whose jobs were jeopardized;

(B) identify the Mexican-American workers who were deprived of employment opportunities;

(C) specify how Mexican-American workers' jobs were jeopardized;

(D) specify how Mexican-American workers' employment opportunities were deprived;

(E) specify how the status of Mexican-American employees was adversely affected.

Interrogatory No. 4

With regard to the allegations contained in Paragraph IX of the complaint which state:

"... within ninety (90) days of the occurance or the acts of which he complains, Plaintiff, Mariano S. Falcon, filed written charges, under oath, with the Equal Employment Opportunity Commission alleging denial by Defendant of Plaintiff's rights under Title VII of both the "Civil Rights Act of 1964, as amended", and 42 U.S.C. Section 2000e, *et seq.*"

please:

(A) list fully and in detail the "acts" of which Plaintiff complains;

(B) specify the date on which the alleged "acts" occurred;

(C) specify the allegations contained in the charge filed with the EEOC.

Interrogatory No. 5

With regard to the notice-of-right to sue within 90 days, please:

(A) specify the date of such notice;

(B) specify the date Plaintiff requested such notice from the EEOC.

Interrogatory No. 6

Identify all correspondence between Plaintiff and the Equal Employment Opportunity Commission.

(A) State the date on which Plaintiff was informed by the Equal Employment Opportunity Commission that it had been unable to obtain conciliation of Plaintiff's charge against General Telephone Company of the Southwest.

(B) Describe with particularity each and every conference and conversation Plaintiff had with the Equal Employment Opportunity Commission, including, but not limited to, the substance of each conference and conversation, the identity of each and every person attending each conference and conversation, the date or dates of each conference and conversation, and identify all documents evidencing same.

(C) Identify all persons at the Equal Employment Opportunity Commission with whom the Plaintiff had any contact whatsoever.

Interrogatory No. 7

Identify all documents filed by Plaintiff with the Equal Employment Opportunity Commission.

(A) State the date on which Plaintiff filed his charge with the Equal Employment Opportunity Commission.

(B) State the contents of each and every affidavit and any other sworn statements Plaintiff gave to the Equal Employment Opportunity Commission and for each such affidavit and statement, state the date on which each was given.

(C) Identify all persons other than the Plaintiff who made statements, sworn or otherwise, to the Equal Employment Opportunity Commission in connection with Plaintiff's charge against General Telephone.

(D) For each person identified who gave statements to the Equal Employment Opportunity Commission in connection with Plaintiff's charge against General Telephone, state the content of each such statement and state the date on which each such statement was made.

Interrogatory No. 8

Identify the common questions of law and face which affect the rights of the members of the purported class.

Interrogatory No. 9

State the number of persons in the purported class.

(A) Describe with particularity the acts which General Telephone has taken on grounds generally applicable to the Plaintiff which were also applicable to the purported class.

(B) Describe with particularity the actions General Telephone has refused to take on grounds generally applicable to Plaintiff and the purported class.

Interrogatory No. 10

(A) Describe with particularity all policies, practices, customs and usages of General Telephone that discriminate against Plaintiff and other persons in the purported class with respect to compensation, and identify all documents evidencing same.

(B) Describe with particularity all policies, practices, customs and usages of General Telephone that discriminate against Plaintiff and other persons in the purported class with respect to terms of employment, and identify all documents evidencing same.

(C) Describe with particularity all policies, practices, customs and usages of General Telephone that discriminate against Plaintiff and other persons in the purported class with respect to conditions of employment, and identify all documents evidencing same.

(D) Describe with particularity all policies, practices, customs and usages of General Telephone that discriminate against Plaintiff and other persons in the purported class with respect to privileges of employment, and identify all documents evidencing same.

(E) Describe with particularity all policies, practices, customs and usages of General Telephone that subject Plaintiff and other persons in the purported class to continuous employment discrimination, and identify all documents evidencing same.

Interrogatory No. 11

With regard to Plaintiff, Mariano S. Falcon, state the following:

(A) the date of his birth;

(B) the place of his birth;

(C) his father's name;

(D) the place of his father's birth;

(E) his mother's name;

(F) the place of his mother's birth;

(G) his educational experience;

(H) all prior work experience.

Interrogatory No. 12

(A) Identify all documents which evidence that all matters regarding compensation, terms, conditions and privileges of employment of the Plaintiff by General Telephone have been governed and controlled by General Telephone exclusively.

(B) Identify all persons who have knowledge that all matters regarding compensation, terms, conditions and privileges of employment of the Plaintiff by General Telephone have been governed and controlled by General Telephone exclusively.

Interrogatory No. 13

Describe with particularity all self-improvement efforts made by Falcon, and state the date on which each such effort was made.

Interrogatory No. 14

Identify all jobs into which Falcon has sought to be promoted since his employment with General Telephone and state the date on which he sought each such job.

(A) Were you ever selected for promotion to Installer Repair person by General Telephone?

(B) Have you ever turned down a promotion to Installer Repair person?

(C) State each and every reason why you turned down a promotion to Installer Repair person.

(D) Describe with particularity each and every attempt by you to obtain a promotion at General Telephone, including, but not limited to, all efforts made by you to notify General Telephone that you wanted each such promotion, and identify all documents evidencing same.

Interrogatory No. 15

Have you ever misused a credit card issued to you by General Telephone?

Interrogatory No. 16

Describe with particularity each instance whereby you have been disciplined by General Telephone, no matter how slight, including, but not limited to, the identity of the person who disciplined you, the date of each such instance, the reason for each such instance, and identify all documents evidencing same.

Interrogatory No. 17

Identify the Defendant's place of business in Irving, Texas, where the events alleged in the complaint herein occurred.

Interrogatory No. 18

Describe with particularity each and every incident of discrimination that has been taken against Falcon by any

persons employed by General Telephone, including, but not limited to, the date of each such incident, and the identity of each person who participated in each such incident.

PRESTON, HOLT & GOODRUM
P. O. Box 1001
San Angelo, Texas 76901
(915) 949-9683

STEPHEN W. HOLT

COKE & COKE
3600 First National Bank Bldg.
Dallas, Texas 75202
(214) 741-3401

PATRICK E. HIGGINBOTHAM
E. RUSSELL NUNNALLY

By: /s/ E. Russell Nunnally

[Filed May 5, 1975]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

PLAINTIFF'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES

TO: The attorneys for General Telephone Company of the Southwest, Stephen W. Holt, P.O. Box 1001, San Angelo, Texas 76901 and Patrick E. Higginbotham and E. Russell Nunnally, 3600 First National Bank Bldg., Dallas, Texas 75202

NOW COMES, MARIANO S. FALCON, Plaintiff, and makes the following answers to Defendant's First Interrogatories:

1. (A) Plaintiff refers the Defendant to the employment records of Jerry Eden, Mariano Flacon, Randall Raley, Jerry Hoffman, William Hamrick, Felix Sowell, and James Morrow and particularly to Forms S-5015, PN-251, and the Personnel Records Change Notices covering the years 1969 through 1975 within each personnel record.

   (B) See the response to Interrogatory 1 (A)

   (C) See the response to Interrogatory 1 (A)

   (D) See the response to Interrogatory 1 (A)

   (E) At this date it is contemplated that some of the following people will testify: Robert W. Ferguson, John Chamberlain, William Robert Baxter, Alan Wilcox, Rick Schaeffer, Pete Butler, Loy Goldston, Rhett Munn, and Mariano Falcon.

2. (A) Felix Sowell, James Morrow, Jerry Hoffman, Randy Raley, and Jerry Eden are some of the Anglo employees who have been promoted more rapidly.

(B) See the response to Interrogatory 2(A)

(C) Plaintiff would direct the Defendant's attention to the following forms:

	S-5015	PN-251	Personnel Records Change Notices
Eden	5-10-72	undated	1-24-72
			3-12-72
			10-8-72
			9-23-73
Mariano Falcon	7-31-72	undated	7-7-69
	6-15-73		7-31-69
Randell Raley	3-18-71	undated	7-27-70
	12-27-71		12-6-70
	8-25-72		7-25-71
	8-13-73		6-13-72
			3-24-73
Jerry C. Hoffman	4-28-70	undated	6-21-70
	1-27-71		8-16-70
			6-13-71
			12-5-71
			6-4-72
			12-3-72
			6-3-73
William Hamrick	12-5-60	undated	1-3-71
	10-8-70		7-4-71
			1-2-72
			7-2-72 (Special form)
			12-21-72 (Made retroactive to 7-2-72)
			7-1-73 (Special form)

(D) See response to Interrogatory 2(C)

(E) The names of those General Telephone representatives who are responsible for enforcing discriminatory employment practices against the Plaintiff and the class he represents are not available to the Plaintiff without further discovery.

(F) See response to Interrogatory 1 (E)

3. (A) The names of the members of discriminated against class other than Mariano Falcon are in the Defendant's files and are not available to the Plaintiff without further discovery.

   (B) See the response to Interogatory 3 (A)

   (C) Mexican-American workers' jobs were jeopardized through lack of promotional, transfer and economic opportunities.

   (D) See response to Interrogatory 3 (C)

   (E) See response to Interrogatory 3 (C)

4. (A) Plaintiff would refer the Defendant to Paragraphs VI, VII and VIII of the Plaintiff's Original Complaint wherein the acts of which the Plaintiff complains were laid out. Additionally, Plaintiff would refer the Defendant to the original charge of discrimination which is attached in response to Interrogatory 3 (C).

   (B) The Plaintiff is unable to specify the exact dates on which the acts occurred without further discovery.

   (C) Copy of the Original Charge filed with the EEOC is attached.

5. (A) January 21, 1975.

   (B) January 10, 1975.

6. (A) January 29, 1974.

   (B) Plaintiff is unable to describe each and every conference or conversation with the Equal Employment Opportunity Commission in that reception and secretarial help were neither noted nor identified to the Plaintiff and other than the dates on which Plaintiff's sworn charge was filed with the EEOC and the interview he had with J. E. Lester regarding such sworn charge, Plaintiff is unable to specify any other dates or conferences or conversations.

(C) See response to Interrogatory 6 (B)

7. (A) October 17, 1972.

(B) Plaintiff filed a charge of discrimination on October 17, 1972, and an affidavit detailing some instances of discrimination on October 17, 1972, which is attached.

(C) The information requested is not within the Plaintiff's knowledge.

(D) See response to Interrogatory 7 (C)

8. The facts which affect the rights of the members of the class are the facts of their employment, the ways in which evaluations are made, the subjective rather than objective manner in which recommendations for raises and transfers and promotions are handled, and all of the facts surrounding the employment of Mexican-American persons by General Telephone Company. The questions of law specified in Interrogatory No. 8 call for a conclusion on the part of the Plaintiff.

9. (A) & (B) The actions which General Telephone has taken or refused to take on grounds generally applicable to the Plaintiff which also applies to the class are all of the actions surrounding employment of the Plaintiff and the members of the class by the Defendant. This information is within the Defendant's employment records and it will be made available after further discovery.

10. (A) See responses to Interrogatories 2 (C), 3 (C), 6 (A), 6 (C), and 9 (A) & (B).

(B) See response to Interrogatory 10 (A)

(C) See response to Interrogatory 10 (A)

(D) See response to Interrogatory 10 (A)

(E) See response to Interrogatory 10 (A)

11. (A) 10-22-41

(B) Bracketville, Texas

(C) Rogaleo Falcon

(D) Unknown

(E) Feliz Falcon

(F) Mexico

(G) Plaintiff refers the Defendant to the Record of Training and Education filed with the personnel departments of General Telephone.

(H) Plaintiff refers the Defendant to Form S-5001-SN (Rev. 3-69) filed with General Telephone on June 3, 1969, in connection with Operation Attainment.

12. (A) This information is not within the Plaintiff's knowledge and will be furnished after further discovery.

(B) This information is not within the Plaintiff's knowledge.

13. The lack of specificity as to the direction and focus of the Defendant's question regarding the Plaintiff's attempts at self-improvement requires the Plaintiff to ask for a clarification before this Interrogatory can be answered.

14. Yes

(B) Yes

(C) The Defendant company was having customer problems. The company was standing behind the customer instead of the employees.

(D) The information requested is not available to the Plaintiff at this time without further discovery.

15. Yes

16. On November 9, 1970, Plaintiff purchased cigarettes with his credit card. To Plaintiff's knowledge there

was no other person disciplined with him and the supervisor who signed the discipline record was J. L. Goldston. On May 7, 1975, Plaintiff hit a sewer line and did not report it. Harvey Summer was the person who disciplined the Plaintiff. Plaintiff does not have any documents evidencing this disciplinary action.

17. Defendant's place of business where the events alleged and the complaint occurred would be that place of business in Irving, Texas, where the employment records and the decisions regarding employment and promotions and transfer are made.

18. There are no incidents to describe except the actions taken by the management in regard to promotions and employment and transfer opportunities which make up the basis of this suit. Plaintiff also filed a discrimination charge with his union.

/s/ Mariano S. Falcon
MARIANO S. FALCON

Respectfully submitted,

HERNANDEZ, INC.
1700 Fidelity Union Tower
Dallas, Texas 75201
(214) 747-1632

By: /s/ Frank P. Hernandez
FRANK P. HERNANDEZ
Attorney for Plaintiff

CHARGE OF DISCRIMINATION

...have a complaint, fill in this form and mail it to the Equal ...ployment Opportunity Commission's Regional Office in your ...In most cases, a charge must be filed with the EEOC within ...cified time after the discriminatory act took place. IT IS ...EFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS ...SIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TDA3-0602

(PLEASE PRINT OR TYPE) SS# 456-66-2100

...e (Mr., Mrs., Miss) Mariano Salome Falcon Phone Number 321-0833

...et Address 219 Mount Lockout

...y Dallas State Texas Zip Code 75211

...S THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☒ Sex ☐ SSH

...o discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprentice...p committee. If more than one, list all.

...me General Telephone Company of the Southwest

...et address 350 N. Beltline Rd

...y Irving State Texas Zip Code

...D (other parties if any)

...ve you filed this charge with a state or local government agency? Yes ☐ When (MONTH DAY YEAR) No ☒

...your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

...e most recent date on which this discrimination took place: Month Sept Day 18 Year 1972

...plain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I believe that I have been discriminated because of my national origin — Spanish.

I have been passed up for promotion to supervisor with less seniority and less experience than I have. This is contrary to my written personnel appraisals in the following areas beginning 6 months prior to this time. I believe that the Company's promotional policy has operated against a class — Spanish.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date Oct 17, 1972 X Mariano Salome Falcon (Sign your name)

Subscribed and sworn to before me this 17th day of October 19 72

A E Lutz (Name) Case Analyst (Title)

It is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you get the form sworn to.

...APPL. BUR. OF BUDGET—No. 124-R0001 FORM EEOC-5 (REV. 7-68)

AFFIDAVIT

STATE OF TEXAS)
COUNTY OF Dallas) ss.

I, Mr Marion Tabor Flores, AFTER BEING DULY SWORN, UPON MY OATH DEPOSE AND SAY:

I WAS BORN 10/22/41 (Date). I AM 30 YEARS OF AGE AND LIVE AT 214 Mount Lockout (Number and Street), CITY OF Dallas, COUNTY OF Dallas, STATE OF Texas, 75211 (Zip). MY TELEPHONE NUMBER IS AC 330-0833 AND MY SOCIAL SECURITY NUMBER IS 456-66-2120

I AM ~~(WAS)~~ EMPLOYED AT General Telephone Company of the SW CITY OF Irving, STATE OF Texas, (Zip).

WHERE MY TELEPHONE NUMBER IS ~~(WAS)~~ AC 252-6939. I HAVE ~~(HAD)~~ BEEN EMPLOYED THERE SINCE July 1969 (Date) AND MY POSITION IS ~~(WAS)~~ THAT OF Lineman In Charge.

I MAKE THE FOLLOWING STATEMENT OF MY OWN FREE WILL:

I was hired by General Telephone in July 1969 as a groundman. A month later I received promotion and a raise to Lineman in Charge. I have received no further advancement. The normal progression of jobs from both the groundman & Lineman in Charge is to Inspector, Cable Foreman, and finally Construction Foreman.

My present supervisor, Bill Hamrick will be made Lineman in Charge the same time I do. He has since become a Construction Foreman. Jerry Hoffman (white) and Chuck [illegible]

TAC 7683-0002

factory inspection ~~and was promoted from quality control~~ to inspector within the first year. This ~~year~~ later he was made a crew foreman and two months later a construction foreman.

~~Grady Sinclair~~ (white) was hired in the latter part of 1970 and was made an inspector from trainee within a year. He is now an installation supervisor in Carrollton, Texas.

~~Jerry Eldon Cockrell~~ was hired in April, 1972 as a trainee. He had seven years of service as a contractor. He was given duties of inspector on September 19, 1972.

I believe that I have been discriminated against by my Company's promotional policy because I am an SSA. Witnesses who will attest to both my qualifications and the facts in this affidavit are: (1) Bob Ferguson; (2) John Chamberlain — union steward of my union, CWA #---, Communications Workers of America; (3) Dick DeLaffer; (4) Stanley Mann; (5) Mike Wittop; (6) Willy Carter; (7) Pete Cutler — all white.

Mr. Leo Goldston is my area supervisor and he will have to verify my duties.

I HAVE READ THE ABOVE STATEMENT, CONSISTING OF 2 PAGES, INCLUDING ANY PARTS OF IT WRITTEN ON THE BACK OF THESE PAGES, AND I SWEAR OR AFFIRM THAT IT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Marcia Dolores Felicia
(Signature)

SUBSCRIBED AND SWORN TO BEFORE ME AT Dallas, TEXAS, THIS 17th DAY OF October, 19 72.

NOTARY PUBLIC (Signature)

_____, Notary Public

FOR _____ COUNTY, TEXAS

MY COMMISSION EXPIRES _____

- or -

J E Lesley
EQUAL EMPLOYMENT OFFICER
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[Filed September 4, 1975]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

PLAINTIFF'S BRIEF IN SUPPORT OF HIS CLASS ACTION

I.

BASIS FOR MAINTENANCE OF CLASS ALLEGATIONS

The experience of the federal courts over the last two decades has been that racial discrimination, particularly discrimination in employment, is often subtle and not easily proved. The consequences of such discrimination are most grave, both for the individual victim and for society at large. *Booth v. Prince George's County, Maryland, et al*, 9 E.P.D. ¶ 10,075 (D.C. Md. 1975). A policy which the 5th Circuit has adopted in aiding victims of discrimination has been to permit "an across the board" attack on unequal employment practices alleged to have been committed by the employer pursuant to its policy of racial discrimination rather than narrowing the class. *Johnson v. Goodyear Tire & Rubber Co.*, 417 F.2d 1122 (5th Cir. 1969).

It is the Plaintiff's contention that he was locked into a company position because he was a member of an unfavored social minority class. The discrimination suffered by the Plaintiff was not unique to his position but was also imposed on the class of Mexican Americans which Plaintiff properly represents.

A.

THE COURT SHOULD RULE THAT THE PLAINTIFF'S CAUSE OF ACTION SHOULD BE MAINTAINED AS A CLASS ACTION

All Title VII cases are class actions. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969), 2 E.P.D. ¶ 10,090; *Hall v. Werthan Bag Corp.*, 251 F.Supp. 184 (D.C. Tenn. 1966).

While it may be true that there are different factual questions with regard to different employees, it is also true that the

> "Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class." *Hall, supra.*

The Court in *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968) refused to narrow a class based upon reasoning that there are different facts and circumstances involved in employment decisions, jobs and qualifications.

In *Hall, supra*, the Court in analyzing the requirements for the maintenance of class actions as set forth in Rule 23(a) and 23(b)(3), Federal Rules of Civil Procedure, said:

> "Although Rule 23(a) has often been invoked in cases challenging a policy which is illegally discriminatory on its fact, several courts, doubting the existence of a common question of law or fact, have held that class actions are not proper in cases challenging the practice of discrimination which occurs apart from an avowed policy of discrimination. For purposes of allowing a class action for injunctive relief, however, this Court is unable to perceive any real distinction between a policy which is discrim-

inatory on its fact and a policy which is shown to exist and to be discriminatory only by an analysis of its application, or as the Defendant structures in its brief, between a class discrimination because of race and an individual discrimination because of race. *Racial discrimination is by definition class discrimination. If it exists, it applies throughout the class.*" [Emphasis added]

The Court in *Bowe, supra*, further held that Title VII suits should be treated as class actions for all purposes of relief, and not merely for injunctive purposes. (At 2 E.P.D. ¶ 10,090, page 385).

Furthermore, it would be error for the Court to refuse to allow the Plaintiff to represent the class until he proved his own right to relief. *Johnson, supra.* Since the Plaintiff is basing his right to relief on the grounds of racial discrimination on the part of the Defendant in its employment practices, a denial of his right to maintain a class action would be to deny the racial basis for Plaintiff's suit.

The Courts have held that racial discrimination is by definition class discrimination, and, while the effect of past discrimination may differ as to individuals, it is evident that common questions of law or fact affecting all members of a class exist insofar as the suit seeks removal of discriminatory policies. *Hall, supra; Johnson, supra; Bowe, supra.*

Once the Court finds that discrimination exists against the Plaintiff, it is duty-bound to require the Defendant to produce evidence which has been refused in the past and the Court is bound to remove all vestiges of discrimination.

In *Bowe, supra*, the Court held that 42 U.S.C. § 2000e5(g) requires that if the court finds an intentional unlawful employment practice, it may enjoin the practice "and order such affirmative action as may be

appropriate." The Court said, "This grant of authority should be broadly read and applied so as to effectively terminate the practice and make its victims whole." *Bowe, supra*, at 2 E.P.D. ¶ 10,090, page 386. Thus, the full remedial powers of the Court must be brought to bear and all appropriate relief given to the Plaintiff.

Once racial discrimination is found to exist, the Court must order that it be discontinued. *Potts v. Flax*, 313 F.2d 284, 289 (5th Cir. 1963). The Court's decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others. *Shelly v. Kraemer*, 334 U.S. 1, 68 Supp. Ct. 836 (1948).

By analogy to *Potts, supra*, to grant relief to the Plaintiff alone, while others, having no protection, were continued to be discriminated against and so continue to be, would be for the Court to contribute actively to the class discrimination proscribed in *Johnson, supra, Hall, supra;* and *Bowe, supra.*

The Plaintiff has brought this class action under subsection (b) (2) of Rule 23, which states that a class action is maintainable when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The Committee Notes to Rule 23(b) (2) indicate that it was intended as a vehicle for civil rights attacks on unlawful discrimination against a class whose members might be incapable of specific enumeration. See 3 B. J. Moore, Federal Practice, ¶ 23.01[10.-2] (2d. ed. 1974).

Broadly viewed, Plaintiff's suit is an "across-the-board" attack on all discriminatory actions by Defendant on the ground of race, and when so viewed it fits comfortably within the requirements of Rule 23(b) (2). See *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969).

B.

PLAINTIFF FAIRLY AND ADEQUATELY REPRESENTS THE CLASS

As a Mexican American hourly employee of the Defendant company, the Plaintiff obviously has the standing to represent that class of Mexican American hourly employees who were discriminated by the Defendant. The class, however, is not limited to this subclass of Mexican Americans, but encompasses a divergent group of Mexican Americans. As stated in *Harvey v. International Harvester Co.*, 56 F.R.D. 47 (1972):

> "A class action against an employer for alleged discrimination may be maintained on behalf of all persons who are members of racial or ethnic minorities . . . who have been employed, are employed, or may in the future be employed, at the employer's plant, and who have been, are presently being, or may in the future be, adversely affected by employment practices of the employer which discriminates on the basis of race, color, or national origin."

The Fifth Circuit has recently reiterated its position as to the members that are to be included in the class. In *Long v. Sapp*, 502 F.2d 34 (5th Cir. 1974) the court held that:

> "In a class action, the plaintiff would be permitted to represent not only all black persons discharged by the defendant, but also, all black persons who have applied for employment with the defendant or who would have applied for employment had defendant not practiced racial discrimination in employment and recruiting."

In the instant case, the Plaintiff is seeking to represent not only all hourly Mexican American employees who have been employed, are employed, or may in the future be employed, but also, all those Mexican Ameri-

cans who have applied or who would have applied for employment had the defendant not practiced racial discrimination in its employment practices. Plaintiff would submit that discrimination was not confined to any one branch of the Defendant company's Irving Exchange, but existed in the branches of Azle, Carrollton, Coppell, Grapevine, Lewisville and Keller.

The scope of the Plaintiff's claim is broad enough to include former, as well as present and prospective employees. See *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). Furthermore, as a person aggrieved, the Plaintiff can represent other victims of the same discriminatory policies, whether or not all have experienced discrimination in the same way. *Reed v. Aplington*, 476 F.2d 721 (8th Cir. 1973), cert. denied, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1974).

The Fifth Circuit, in *Long*, *supra*, reversing the District Court's ruling that the plaintiff could not represent the class of black persons who have applied or who would have applied for employment had the defendants not practiced racial discrimination noted that,

> [Plaintiff] directs her claims at racially discriminatory policies that she alleges pervades all aspects of the employment practices of [defendant]. Having shown herself to be black and a former employee . . . she occupies the position of one she says is suffering from the alleged discrimination. She has demonstrated the necessary *nexus* with the proposed class for membership therein."

Like the plaintiff in *Long*, *supra*, Falcon, the Plaintiff herein, has directed his attack at discriminatory policies of Defendant manifested in various actions, and as one who has been aggrieved by some of those actions he has demonstrated a sufficient nexus to enable him to represent others who have suffered from different actions motivated

by the same discriminatory policies. Moreover, it is unnecessary to have factual identity between the Plaintiff's circumstances and those of the class sought to be represented. *Bateman v. Retail Credit Co.*, 320 F.Supp. 1115 (N.D. Ga. 1970).

The Plaintiff, in the case at bar, seeks to pursue the policy of the 5th Circuit in his representation of the class herein alleged. In *Johnson v. Goodyear Tire & Rubber Co., supra*, and more recently in *Carey v. Greyhound Bus Co., Inc. et al*, 500 F.2d 1372 (5th Cir. 1974), the court has held,

> "Title VII racial discrimination claims present an appropriate area in which to require class wide [relief]. The individual discriminatee has been locked into his under-compensated position precisely because he is a member of an unfavored class. To implement the purposes behind Title VII, a court should give 'a wide scope to the act in order to remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities.' "

In light of the policies adopted by this Circuit and in view of the sufficient nexus established by the Plaintiff with all members of the class, the Plaintiff has sufficiently satisfied the requirements of Rule 23(a)4, and has thereby shown that his claim of discrimination is typical of the class which he represents in accordance with Rule 23(a)(3).

It is thus, the Plaintiff's position, that he can properly represent the class of all hourly Mexican American employees who have been employed, are employed, or may in the future be employed and all those Mexican Americans who have applied or would have applied for employment had the Defendant not practiced racial dis-

crimination in its employment practices. *Johnson v. Goodyear Tire & Rubber Co., supra; Carey v. Greyhound Bus Co., Inc., et al, supra.*

Respectfully submitted,

HERNANDEZ, INC.
1700 Fidelity Union Tower
Dallas, Texas 75201

By /s/ Frank P. Hernandez
FRANK P. HERNANDEZ
Attorney for Plaintiff

[Filed October 8, 1975]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

MOTION TO RECONSIDER CERTIFICATION OF A CLASS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, General Telephone Company of the Southwest, and moves the Court to reconsider its certification of this matter as a class action, and for grounds would show the Court as follows:

I.

Plaintiff is not an adequate representative of all members of the class that he seeks to represent.

II.

The number of persons in this class are not so numerous that joinder would be impracticable, and all persons comprising the class are within the jurisdiction of this Court.

WHEREFORE, premises considered, Defendant prays that upon hearing hereof, this Honorable Court order that this matter not go forward as a class action, and for any further relief to which Defendant may be entitled, either in equity or at law.

Respectfully submitted,

COKE & COKE

By /s/ E. Russell Nunnally
E. RUSSELL NUNNALLY
3600 First National Bank Bldg.
Dallas, Texas 75202

PRESTON, HOLT & GOODRUM

By /s/ Stephen W. Holt
STEPHEN W. HOLT
P.O. Box 1001
San Angelo, Texas 76901

[Filed February 20, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO RECONSIDER CERTIFICATION OF A CLASS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, General Telephone Company of the Southwest ("General Telephone"), and files its Brief in Support of its Motion to Reconsider Certification of a Class, and for grounds would show the Court as follows:

I.

NATURE OF THE CASE

Plaintiff, Mariano S. Falcon ("Falcon"), a Mexican American filed this lawsuit against General Telephone claiming violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e ("Title VII") and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Generally, Plaintiff claims that General Telephone discriminated against all Mexican-Americans in the terms and conditions of their employment. It appears that Plaintiff's claim purports to reach all phases of Defendant's personnel policies. Plaintiff seeks recovery not only for himself, but for a class consisting of Mexican-Americans who are either employed by, or who have sought employment with General Telephone at its Irving, Texas Division ("Irving Division").

General Telephone contends that it has not discriminated against anyone on the basis of race or national origin, or for any other reason. Plaintiff seeks both injunctive relief, in the form of an order that Defendant be enjoined from continuing its alleged policy of discrimination against Mexican-Americans, and back pay for all persons in the class.

II.

FACTS

Falcon was employed by General Telephone on or about July 1, 1969. He was hired pursuant to a program titled Operation Attainment, an affirmative action program by General Telephone designed to hire and train minorities. General Telephone's purpose in Operation Attainment was to provide opportunities for hard core unemployed* members of minority groups. Its goal was to see that these persons were hired, given training for basic jobs, and allowed to progress through the personnel structure of General Telephone to the highest level of their abilities.

At the time he was hired, Falcon was trained by General Telephone to perform the duties of a ground worker, *i.e.*, basic tasks in construction work. Those duties entailed assisting line workers while the latter either laid underground cable or strung wires along telephone poles. The ground worker also assisted in the repair and maintenance of telephone lines and cables.

Within the first year Falcon was with General Telephone, he was promoted from ground worker to line worker to lineworker-in-charge (see exhibit attached to Answer to Interrogatory 47). Each of Falcon's promotions were coupled with a raise in pay and an increase in responsibility.

General Telephone's Answers to Interrogatories reveal that General Telephone employs approximately ** twenty-six Mexican-Americans in the Irving Division (see Answer to Interrogatory 9). In addition, over the past

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* The term hard core unemployed as used here means those persons who have little or no education and little or no previous training and skills.

** The Answers to Interrogatories are accurate as of September 29, 1975; however, there has been no appreciable difference in the data from that date to the present.

three years, seventeen persons who may be Mexican-Americans applied for employment as a line worker in the Irving Division, but did not receive jobs (see Answer to Interrogatory 28).

Of those persons who are Mexican-Americans and who are employed by General Telephone in the Irving Division, twenty-five are hourly paid employees and are covered by the bargaining agreement between General Telephone and the Communications Workers of America (compare Answer to Interrogatory 9 to exhibit attached to Answer to Interrogatory 25). One Mexican-American employee in the Irving Division is a foreman and is a part of management; he is not covered by the bargaining agreement (*Id.*). Of the twenty-five Mexican-American persons who are included in the bargaining unit, eight are in the service group, seven are in the clerical group, one is in the service and engineering group, and ten are in the construction group—the group in which Falcon works (*Id.*). According to the best information available to General Telephone, all of the Mexican-American persons who applied for employment as a line worker with General Telephone in the Irving Division and all of the Mexican-American persons who are employed by General Telephone in the Irving Division reside within the jurisdiction of this Court.

The Plaintiff has not offered any proof as to the number of persons in the class. Moreover, the Plaintiff has testified that he does not know either the number of Spanish surnamed persons presently employed in the Irving Division or the number of Spanish surnamed persons who have applied for employment in the Irving Division (see Falcon deposition pp. 53-54). Furthermore, Plaintiff does not believe that there are any Spanish surnamed persons in the Irving Division, other than himself, who have not been given an equal opportunity for promotions. (see Falcon deposition, p. 127, lines 21-25). The only evidence concerning the size of the class and the location of the class members, therefore,

is General Telephone's Answers to Interrogatories, and that evidence shows conclusively that (1) Falcon is not an adequate class representative and (2) the class is not so numerous that joinder would be impracticable.

III.

FALCON IS NOT AN ADEQUATE REPRESENTATIVE OF THE DEFINED CLASS

Falcon seeks to represent a wide spectrum of interests in this cause, not all of which concern him; hence, he does not have that overall interest that is necessary to permit him to be the class representative. It is essential that the class representative be a member of the class he seeks to represent, and Falcon is not. Fed. R. Civ. P. 23(a); *Hall v. Beals*, 396 U.S. 45 (1969); *Bailey v. Patterson*, U.S. U.S. 31 (1962); *Wells v. Ramsay, Scarlett and Company*, 506 F.2d 436 (5th Cir. 1975); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966).

Since Falcon was hired by General Telephone and is still employed by General Telephone, he cannot adequately represent the interests of those persons who were not hired by General Telephone, for example. If he is permitted to do so, nothing will preclude his bargaining less strenuously for the claims of those who have not been hired, as compared to the claims of those who are employed by General Telephone. The mere *potential* of this danger is reason alone to justify the requirement that a class representative be a member of the class. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940). While Falcon may not consciously, or even unconsciously underplay the contentions of those whose interests differ from his, it is the very appearance of impropriety that this Court must avoid by restricting his representation to those whose interests are exactly the same as his own.

In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Supreme Court noted the pitfalls of allowing someone whose inter-

ests were not exactly the same as the class as a whole to represent the class:

> "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. * * * Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants." 311 U.S. at 45.

While courts have been generally receptive to class actions in civil rights litigation, it is not mandatory that they do so. Indeed, unless the requirements of Rule 23 are met, no cause of action can proceed as a class action. The court relied on this very point in *Kinsey v. Legg, Mason & Company, Inc.*, 60 F.R.D. 91 (D. D.C. 1973), where it refused to allow a Title VII case to proceed as a class action. In setting out the reasons for doing so, Judge Gasch stated:

> "It has long been recognized that under certain circumstances class actions are allowable for suits alleging racial discrimination in employment under Title VII of the 1964 Civil Rights Act. [citation omitted] However, *it should be emphasized that not every civil action brought pursuant to Title VII automatically qualifies as a proper class action under the stringent requirements of Rule 23(a).*" 60 F.R.D. at 98 (emphasis supplied).

In *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966), the Fifth Circuit, in an opinion by Judge Brown, refused to allow a black person claiming civil rights viola-

tions to represent a class consisting of other blacks for the very same reason that this Court should not allow the Plaintiff here to do so—i.e., she was not a member of the class that she purported to represent. In that case five blacks filed a class action seeking to enjoin elections in certain communities in Mississippi until all blacks had been allowed to register to vote. The Plaintiffs also attacked the requirement that a poll tax be paid. It was discovered that one of the plaintiffs had registered to vote and had paid her poll tax. The Fifth Circuit overwhelmingly affirmed the trial court ruling that she was not a proper class representative. In doing so, Judge Brown wrote:

> "It is *elementary* that 'an individual suing in behalf of the members of a class *must* be a member of the class which he is supposed to represent.' 2 Barron & Holtzoff, Federal Practice and Procedure § 567, at 308 (Wright rev. 1961)." 358 F.2d at 219 (emphasis supplied).

In *Hall v. Beals*, 396 U.S. 45 (1969), the Supreme Court, faced with another controversy involving the right to vote, reached a similar decision. The plaintiffs there had challenged the constitutionality of the voter residency requirements in Colorado. While the case was on appeal, the residency requirement was reduced from six months to two months. The plaintiffs had lived in Colorado more than two months at the time they brought suit, but less than six months. After the statutory change, the plaintiffs were no longer members of the class they sought to represent. The Supreme Court held that they could not go forward as class representatives and dismissed the class action.

In *Bailey v. Patterson*, 369 U.S. 31 (1962), another civil rights case, the plaintiffs sought to enjoin the enforcement of breach of the peace laws against persons who attempted to segregate public facilities. None of the plaintiffs had been arrested or prosecuted under those

laws. The Court held that they were not members of the class and, therefore, not proper class representatives. The Court emphatically set this minimum standard for class representatives. It clearly stated:

> "They cannot represent a class of whom they are not a part." 369 U.S. at 32, 33.

The facts here are very similar to the facts in a recently reported decision where a class action was not allowed. *Knox v. Meat Cutters*, —— F.R.D. ——, 11 BNA FEP Cases 1327 (E.D. La. 1975) (copy attached), *appeal dismissed*, 520 F.2d 1205 (5th Cir. 1975). In *Knox*, Judge Cassibry was asked to certify a black plaintiff as a class representative for all "blacks and/or minorities" who had applied for employment with the defendant, all "blacks and/or minorities" who had applied for a promotion with the defendant, all "blacks and/or minorities" who had applied for membership in the defendant union, and all non-employee minorities who had been deterred from applying for a job with the defendant because of the defendant's reputation for bias. The plaintiff in *Knox* was a truck driver. The defendant's contention that the plaintiff could not adequately represent all of the persons whom he sought to include in the class was persuasive. The defendant pointed out that the plaintiff was not an adequate representative for office and clerical employees, since the plaintiff was a production employee. *The same situation is true here!*

Falcon is a construction employee, yet he seeks to represent a class which includes, among others, office and clerical personnel. In *Knox*, the Court decided that a proper nexus did not exist between the plaintiff and all those he sought to represent. In restricting the class to hourly, production employees, the court stated:

> "The fact that plaintiff is a black employee seeking to represent all other blacks discriminated against by the defendant is therefore not enough necessarily

to provide the nexus for class representation." 11 BNA FEP Cases at 1330.

It is questionable, therefore, that Falcon's nexus with the Mexican-Americans who are employed by General Telephone is necessarily sufficient to allow him to be their representative. It is beyond question that his nexus with those Mexican-Americans who were not hired is *not* enough.

The Fifth Circuit recently reviewed a case which should be persuasive here. *Wells v. Ramsay, Scarlett and Company*, 506 F.2d 436 (5th Cir. 1975). The plaintiff in *Wells* was a black who had worked for the defendant as a foreman. He had been fired and claimed that his firing was the result of racial discrimination. He sued both his employer and his union on behalf of all black longshoremen who were or might have been employed by the defendant employer and members of the defendant union. In an opinion by Judge Bell, the Fifth Circuit affirmed the district court's decision not to allow the case to proceed as a class action. In doing so, the court stated:

> "We conclude that the *nexus* between plaintiff and the class was insufficient and thus the district court did not err in declining to allow the cause to proceed as a class action. * * * One may not represent a class of which he is not a part." 506 F.2d at 437-38.

The same rationale was followed by Judge Wood in determining that a foreman could not adequately represent the claims of all employees in *McClinton v. Turbine Support*, 68 F.R.D. 236 (W.D. Tex. 1975). The plaintiff in *McClinton* was a non-union, salaried employee attempting to voice the claims of hourly paid, union members. Here Falcon, an hourly paid, union member, is attempting to pursue the claims of, among others, a salaried, non-union employee.

In addition Falcon seeks to represent persons who are in jobs with no similarity whatsoever to the jobs that

he has performed. Furthermore, each job and each department has different supervisors, and each entails different qualifications, duties and responsibilities. Given these dissimilarities, it is questionable whether Falcon's claims are typical of all Mexican-American employees in the Irving Division, which is yet another criterion Plaintiff fails to meet. Fed. R. Civ. P. 23(a)(3); *and see, Peltier v. City of Fargo,* —— F.R.D. ——, 10 BNA FEP Cases 701 (D. N.D. 1975) (copy attached). Hence, Falcon is not even a true representative of the Mexican-Americans who are employed by General Telephone.

If the class is properly defined and is limited to those persons whose interests Falcon adequately and properly represents, *i.e.*, Mexican American employees in the Irving Division in the construction wage group, the class would comprise of ten persons, all of whom are within the jurisdiction of this Court. As will be shown *infra*, a class of that size does not meet the numerosity requirement of Rule 23 of the Federal Rules of Civil Procedure. Nevertheless, it is clear that Falcon cannot truly represent the class as it is now defined, and for that reason alone, this cause should not proceed as a class action.

III.

THE CLASS OF PERSONS FALCON SEEKS TO REPRESENT IS NOT SO NUMEROUS THAT JOINDER WOULD BE IMPRACTICABLE

As demonstrated *supra*, the class of persons Falcon can adequately represent consists of only ten persons. That number is not so numerous that joinder would be impracticable; therefore, a class action is improper. Fed. R. Civ. P. 23(a)(1); *Hill v. American Airlines, Inc.* 479 F.2d 1057 (5th Cir. 1973); *Carey v. Greyhound Bus Co.*, —— F.Supp. ——, 11 BNA FEP Cases 1403 (E.D. La. 1975) (copy attached); *McClinton v. Turbine Support*, 68 F.R.D. 236 (W. D. Tex. 1975); *Gay v. Waiters Union, Local 30*, ——F.R.D. ——, 10 BNA FEP Cases 864, (N.D. Cal. 1975) (copy attached); and *Darden v.*

G. T. E. Sylvania, Inc., —— F.R.D. ——, 10 BNA FEP Cases 1097, (N.D. Ga. 1974) (copy attached).

Even if Falcon is allowed to represent all of those persons whom he seeks to represent, the class would only consist of forty-three people, all of whom are within the jurisdiction of this Court.

Using the criteria of the Fifth Circuit in *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974), this Court must not allow this matter to go forward as a class action. The Fifth Circuit in *Carey* remanded the case with instructions to reconsider the class action issue. The district court had failed to state in its original opinion the number of persons in the class. The Fifth Circuit instructed the district court to pay particular attention to (1) the practicality of joinder and (2) the size of the class.

On remand, the district court in *Carey* determined that the size of the class and the practicality of joinder were not such that a class action was required. *Carey v. Greyhound Bus Co., Inc.*, —— F.R.D. ——, 11 BNA FEP Cases 1403 (E.D. La. 1975) (copy attached). The class in *Carey* consisted of either twenty-four or twenty-six persons, neither of which was so numerous to make joinder impractical. In reaching its decision, the court stated:

> "It is, of course, the plaintiff's burden to prove a class so numerous as to preclude practical joinder. This burden is not discharged by mere reference to the appropriateness of class relief in across-the-board racial discrimination claims under Title VII.
>
> * * *
>
> "We fail to see any impracticality in joining 24 or 26 individuals who are so centrally situated for the purposes of litigation. We, therefore, grant defendant's motion to strike the class action brought in each of these proceedings, neither plaintiff having satisfied the burden of establishing the numerosity

prerequisite of Rule 23(a)." 11 BNA FEP Cases at 1405-06.

In *Gay v. Waiters' Union Local No. 30*, —— F.R.D. ——, 10 BNA FEP Cases 864 (N. D. Cal. 1975), the court held that a class of one hundred eighty four parties was not so numerous that joinder would be impracticable. There the court pointed out that numerosity should be viewed in the particular circumstances. A compelling factor in that case was that all parties were susceptible to the jurisdiction of the court, as is true here. If the class in this case at bar is restricted to those persons who are employed by General Telephone, the class will only consist of twenty-six persons (one of whom is in management and is expected to be called to testify on behalf of the defendant) and all are within the reach of this Court.

In *McClinton v. Turbine Support*, 68 F.R.D. 236 (W.D. Tex. 1975), the court noted that the requirements of Rule 23(a) are conjunctive and that all conditions *must* be met. It held that a class which consisted of either nine, twenty or twenty-nine persons was not so numerous as to make joinder impracticable. There, as here, all class members were within the jurisdiction of the court and could have been joined in the lawsuit.

Whether this class consists of ten, twenty-six, or forty-three persons, the number is not so numerous as to make joinder impracticable. All members of any class whom Falcon seeks to represent are within the reach of this court and could be joined as parties. For these reasons this matter should not proceed as a class action.

IV.

SUMMARY

Although it has been noted that all civil rights litigation is essentially class litigation, the cases cited in this brief show that maxim not always to be literally true. As a practical matter, it is generally true that civil rights remedies may benefit all minorities similarly sit-

uated, particularly with respect to injunctive relief. The mere fact that injunctive relief may benefit persons other than the parties to the lawsuit, however, does not require that every civil rights case proceed as a Rule 23 class action. As the Fifth Circuit noted in *Hill v. American Airlines, Inc.*, 479 F.2d 1057 (5th Cir. 1973):

> "Class Actions are permissible, indeed often preferable, in actions under Title VII *if the requirements of Rule 23(a) and (b)(2), Fed. R. Civ. P. are satisfied,* [citation omitted] *but when no such satisfaction occurs, the class action portion of a complaint should be dismissed.*" 479 F.2d at 1059 (emphasis supplied).

In the *Hill* case, the plaintiff sought to represent all blacks in the United States who were or might have been skycaps for American Airlines. The plaintiff had been a skycap in San Antonio and was one of six black employees of American Airlines at that location. The Fifth Circuit affirmed the district court's ruling that a nationwide class was inappropriate and unmanageable. It went on to affirm the ruling that the plaintiff was an inadequate class representative because of a lack of common questions of law and fact, a requirement which the Plaintiff here has failed to prove. The court further agreed that a class of six was not so numerous as to require a class action. It is clear, therefore, that a class action is not required in Title VII cases, and in some circumstances is not even preferable. *See, also, Kinsey v. Legg, Mason & Company, Inc.*, 60 F.R.D. 91 (D. D.C. 1973) (discussed *supra*).

The burden of proof is on the plaintiff to show that the requirements for a class action are present. *See, Williams v. Wohlgemuth* 366 F. Supp. 541 (W. D. Pa. 1973), *affirmed without opinion*, 416 U.S. 901, 94 S. Ct. 1604 (1974); *Tuma v. American Can Company*, 367 F. Supp. 1178 (D. N.J. 1973). The Plaintiff in the present case has failed to meet that burden; therefore, this case should not proceed as a class action.

It is important that this Court reconsider its determination concerning the certification of this cause as a class action, especially in view of the facts which have surfaced in Defendant's Answers to Interrogatories. The Plaintiff presented no facts on which certification was based, and, even though not required, Defendant has now proven that a class action is not proper. The district court's determination of the existence of a class, at least with respect to size, is final unless abuse is shown; therefore, this Court's decision may go unquestioned. *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974). It is imperative, therefore, that this Court reconsider its certification of this matter as a class action and, upon reconsideration, hold that it not go forward as a class action.

V.

CONCLUSION

For the reasons set out herein, this Court should reconsider its determination that this matter go forward as a class action and hold that this cause is not a proper class action.

Respectfully submitted,

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[Filed February 20, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO RECONSIDER CERTIFICATION OF A CLASS

I.

NATURE OF THE CASE

Plaintiff, Mariano S. Falcon, filed this lawsuit against Defendant, General Telephone Company of the Southwest, and claimed violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. ¶ 2000e and the Civil Rights Act of 1866, 42 U.S.C. ¶ 1981. In his original complaint, Plaintiff, a Mexican-American, sought to represent the class of Mexican-Americans who have been adversely affected by discriminatory practices and policies of the Defendant. Plaintiff subsequently filed a brief in support of his class action and contended that the class included all hourly paid Mexican-American employees who had been employed, are employed, or may in the future be employed as well as all those Mexican-Americans who had applied or who would have applied for employment had the Defendant not practiced racial discrimination in its employment practices.

On October 10, 1975, a Pre-Trial Conference was held wherein the Court ruled that the Plaintiff could represent the class. In addition, the Court defined and limited the class to those Mexican-Americans who are employed and to those who have applied for employment in the Irving Division of the Defendant company.

Plaintiff contends that the Court has properly ruled and defined the class and that the evidence conclusively shows that all of the requirements prerequisite to a class action have been met as outlined in Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure.

II.

PLAINTIFF IS AN ADEQUATE REPRESENTATIVE OF THE DEFINED CLASS

The Plaintiff has brought this class action under subsection (b) (2) of Rule 23 of the Federal Rules of Civil Procedure. This rule states that a class action is appropriately brought when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

The relief which Plaintiff seeks is that which can only be available to the class which has suffered racial discrimination. Where racial discrimination is practiced it is not limited to a single individual but to the class of individuals who are similarly situated, i.e., to the class of Mexican-Americans who were employed by the Defendant. The Courts have recognized this and have uniformly held that racial discrimination is by definition class discrimination. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Hall v. Weithen Bag Corp.*, 251 F. Supp 184 (D.C. Tenn. 1966); *Johnson v. Goodyear Tire & Rubber Co.*, 417 F.2d 1122 (5th Cir. 1969).

Initially, Plaintiff contended that racial discrimination could not be confined to an identifiable department or fixed number of Mexican-American employees in the Defendant company. Plaintiff attacked the racial discrimination as it existed in all sectors and departments of the Defendant company where Mexican-Americans were employed or could have been employed. Generally, this approach has been designated as an "across-the-board" attack on discriminatory practices and has been approved by the Fifth Circuit in upholding class actions under Rule 23(b)(2). See *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1972); *Jenkin v. United Gas Corporation*, 400 F.2d 28 (5th Cir. 1968);

Miller et al v. International Paper Company et al, 408 F.2d 283 (5th Cir. 1968); *Oates v. Crown Fellerback Corporation, et al.*, 398 F.2d 496 (5th Cir. 1968).

As a Mexican-American hourly employee of the Defendant company, the Plaintiff can obviously represent the class of Mexican-American hourly employees and prospective hourly employees who were discriminated by the Defendant. The Court has recognized the Plaintiff as a proper representative of this class and has certified the class.

While the Defendant alleges that the Plaintiff cannot adequately represent the interests of Mexican-Americans who were not employed, the Courts have had no problems or reservations in permitting an employee to represent the class of employees and prospective employees and a prospective employee to represent the class of prospective employees and current employees. *Carr v. Conco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970). *Johnson v. ITT-Thompson Industries Inc.*, 3 E.P.D. ¶ 8151 (1971); *Harvey v. International Harvester Co.*, 56 F.R.D. 47 (1972); *Long v. Sapp*, 502 F.2d (5th Cir. 1974).

The Courts have not recognized the appearance of impropriety where an employee seeks to represent the interests of a prospective employee as alleged by the Defendant. Instead, the Fifth Circuit, in *Long* held that,

> [Plaintiff] having shown herself to be black and a former employee . . . occupies the position of one she says is suffering from the alleged discrimination. She has demonstrated the necessary *nexus* with the proposed class for membership therein." (emphasis supplied).

The Plaintiff in the instant case resembles the plaintiff in *Long*. Both attacked the racially discriminatory practices and policies of the Defendant and both were permitted to represent the class of current and prospective employees. It is thus clearly evident that where a plain-

tiff shows himself to be a member of a racial minority group and an employee of the defendant, he has demonstrated the necessary nexus to represent other employees of prospective employees who were subjected to the same discriminatory policies of the defendant. *Long v. Sapp* at 40. Having shown the Court that the Plaintiff is Mexican-American and an employee of the Defendant company, there is no need to modify the class which the Court has certified. The claim of racial discrimination is typical of the class composed of the Plaintiff, the seventeen applicants, and the current Mexican-American employees of the Defendant company. Plaintiff, as a member of this class, can adequately represent the claims of all of the Mexican-American employees who receive hourly wages and are Union members as well as the prospective employees who were not hired.

The Defendant, generally alleges that the class should be recertified in view of the fact that the individual members of the class hold different jobs and perform different tasks. However, the Court in *Bateman v. Retail Credit Company*, 320 F. Supp 1115 (N.D. Ga. 1970) held that,

> Factual identity between Plaintiff's circumstances and those of the class he seeks to represent is not necessary.

Moreover, the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969) has stated that,

> [I]ndividual differences in the effect of the alleged unequal employment practices do not impair the prayer for class relief.

If the Courts were to distinguish the members of a class according to their job functions, department classifications, or employee titles, the Congressional purpose embodied in the Civil Rights Act would be defeated. The "across-the-board" approach of the Fifth Circuit has af-

forded the Title VII plaintiff much leeway in seeking class relief to the class which has been discriminated. The policy adopted by the Fifth Circuit is to eradicate the threat of racial discrimination not only as it effects the complainant but as it applies to the racial class. *Hall v. Werthan Bag Corp.*, 251 F. Supp 184 (D.C. Tenn. 1966).

Courts have not only been receptive to class actions in civil rights litigation but have held that all Title VII cases are class actions. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Hall v. Werthan Bag Corp.*, supra. In view of this policy affording Title VII litigants class action relief, this case should proceed to trial with the class as certified by the Court. The Plaintiff has clearly shown that he is a Mexican-American and an employee of the Defendant company. As a member of this class of individuals, he has demonstrated that he is a proper representative to represent their racial discrimination claims against the Defendant company.

III.

NUMEROCITY OF THE CASE

The class which has been certified and which Plaintiff seeks to represent includes all Mexican-American hourly employees who are Union members and all those Mexican-American applicants who were not employed by the Defendant. Clearly, this class encompasses a group so numerous that joinder of all members would be impractical. Federal Rules of Civil Procedure 23(a)(1); *Cypress v. Newport News General & Nonsectanian Hospital Association*, 375 F.2d 648 (4th Cir. 1967).

Defendant contends that if the Plaintiff is permitted to represent the class as certified, the class would consist of forty-three persons. This number, it is argued, is not so numerous that joinder of all members is impractical. The

Court, however, in *Matthies v. Seymour Mfg. Co.*, 23 F.R.D. 64, 75 (D. Conn. 1958) held that,

> Sheer quantitative measurement is not the test of impracticability; rather, the circumstances surrounding each case are determinative in conjunction with the number involved.

Furthermore, in *Demarco v. Edens*, 390 F.2d 836 (2nd Cir. 1968), the Court therein held that,

> [C]ourts should not be so rigid to depend upon mere numbers as a guideline on the practicability of joinder; a determination of practicability should depend upon all the circumstances surrounding a case.

Numbers then should only have a minimal effect on whether the suit is properly a class action. In this case the Court reviewed the evidentiary submissions before it ruled that a class should be certified.

Although Defendant cites various cases where a specified number has been determinative in permitting a suit to proceed as a class action, other cases have held that a class action could proceed despite the seemingly small number of persons.

In *Cypress*, supra, the Court allowed a class action on behalf of eighteen identifiable members. Similarly, in *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968), the Court permitted a class action to proceed where the class consisted of twenty-five members. In *Fidelis Corp. v. Litton Industries*, 293 F. Supp. 164 (S.D. N.Y. 1968), thirty-five members were allowed to proceed as a class.

Apparently, cases can be cited where seemingly small numbers of persons have been able to constitute a class or where such numbers were disqualified to proceed as a

class. In the instant case, the Court has made an initial certification of a class which consists of more than forty members. In the absence of additional evidentiary submissions, this class should remain intact and proceed to trial as the Court has ruled. In many Title VII cases where the allegations involve "across-the-board" discrimination, as is alleged herein, it has been held that the wise practice is to permit such cases to proceed, at least at the onset, as class actions. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Acry v. Providence Hospital*, 55 F.R.D. 62 (D.D.C. 1972).

IV.

CONCLUSION

For the reasons set out herein, this Court should deny a reconsideration of its determination that this matter proceed as a class action and hold that this cause is a proper class action.

Respectfully submitted,

HERNANDEZ, INC.

By: /s/ Frank P. Hernandez
FRANK P. HERNANDEZ

[Filed March 8, 1976]

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

[EXCERPTS FROM TRIAL TRANSCRIPT]

[Testimony of Robert Ray—Transcript
pp. 12-13, 23-26, 32-33]

[12] Q Let me ask you to turn to Tab A and ask you to get the letter of determination and ask you if you made the recommendations which this determination letter was based on?

A Yes, I did.

Q Now, what were your findings specifically in your investigation of the company as reflected in this letter of determination?

A My recommendation was that we should find that there was reasonable cause to believe that Mr. Falcon's national origin was at least a factor in his not being promoted, but that the allegation of failing to promote Spanish surnamed Americans was not supported by the evidence. Then we made an unalleged finding.

Q You made a finding that Mr. Falcon had been discriminated against because of his national origin, but that the company did not discriminate against Mexican-Americans as a class in their promotional policies?

A Yes.

Q Did you make any investigation into their hiring practices?

A Yes, I did.

Q And what was your findings in that regard?

A I made a recommendation that we find that [13] there was reasonable cause to believe that the company did not hire Spanish surnamed Americans on an equal basis with Anglo-Caucasian Americans.

Q As a class?

A Yes.

Q Let me ask you to turn further into Tab A and ask you to look at some interview notes dated January the 12th, 1974. Are those your notes?

A Yes.

Q And how did you go about this interview in making your notes?

A This was probably by a telephone call to the person mentioned at the top of the memo.

Q And who is that person?

A The first one is Robert Ferguson. The second one—

Q And as you interviewed this individual, did you then at that time make these notes?

A Yes, I did.

Q What do your notes reflect?

MR. NUNNALLY: Your Honor, we are going to object to the interview portion as being hearsay.

* * * *

[23] you by General Telephone at your request?

A Yes.

Q Let me ask you to turn to the second to last tab, Tab F.

THE COURT: What tab is that?

MR. HERNANDEZ: F.

Q (By Mr. Hernandez) Let me ask you to turn to page 7 under Tab F, which is a letter dated September the 10th, 1973.

Do you have that?

A September the what?

Q September 10th, 1973. Do you have that located?

A Uh-huh.

Q This is a letter addressed to you from General Telephone Company setting forth various other charges that you were investigating against the company at that time?

A Yes.

Q And I believe the first one is one on Servando Alaniz?

A Yes.

Q Was that a Mexican-American charge?

A Yes.

Q The second one is on Mr. Falcon, is it not?

[24] A Yes.

Q And they indicate to you in this letter in paragraph 2 that the outside plant inspector's job is classified as a management job, do they not?

A Yes.

Q What is the distinction between the management's job and the job that Mr. Falcon had?

A I believe Mr. Falcon was union and was covered by the seniority provisions of the union contract, and management would not be.

Q And they so indicated this in that same paragraph, do they not?

A Yes.

Q All told at the time that you received this letter and were performing this investigation there were some severe charges covered in that particular letter, were there not?

A Yes.

Q Now, if you would, just briefly describe the rest of the material that is contained in Tab F.

A There is another letter with an additional response. And then the bulk of the information is statistical information on the General Telephone employees.

Q Statistical information which shows the [25] name of the employee, his race, his sex, that sort of thing?

A Yes.

Q His job position?

A Yes.

Q Did you use these statistics in any way in making or concluding what your recommendation would be as to whether or not there was discrimination against Mr. Falcon and the class of Mexican-Americans?

A Yes.

Q Does the Commission use statistics in making determinations as pertains to discrimination?

A Yes.

Q Now, Mr. Ray, every case that you investigate do you find cause for discrimination in every case?

A No.

Q Have you ever had a case where you recommended that a cause letter of determination be issued and it not be issued?

A Yes.

Q Who makes the decision as to whether or not a cause or a no cause finding is to be made by the Equal Employment Opportunity Commission?

A The District Director.

Q Have you ever had a case where you found [26] cause and it was later determined that there was a no cause letter to be issued?

A Yes.

Q How many cases since 1970 have you investigated on behalf of the EEOC, approximately?

A Probably three or four hundred.

Q Has that been—in what locale have those investigations been?

A In Dallas, in New Orleans and Los Angeles.

Q When you go out to investigate a charge do you have any pre-determined, fixed or pre-determined concepts as to whether or not you are going to recommend a letter of determination with cause or without cause?

A No.

Q After you made your recommendation based on your investigation here, did you have anything at all to do with the case of Mariano Falcon versus General Telephone Company?

A No.

MR. HERNANDEZ: I pass the witness, Your Honor.

CROSS EXAMINATION

BY MR. NUNNALLY:

* * * *

[32] Q Did you interview anybody from the company?

A No.

Q So all you interviewed were two of Mr. Falcon's friends that he had said would support his claim?

A Yes.

Q With regard to your comparison of the different employees whom Mr. Falcon claimed were promoted ahead of him, do you know whether all of those people were promoted into management positions?

A I don't recall. I believe they were promoted out of the lineman in charge position, and that was—

Q And you don't know whether they were promoted into management or where?

A No.

Q Do you know whether or not there was a change of location attendant to each of those positions?

A I don't recall.

Q Okay. Now, under Tab F—

THE COURT: Tab what?

MR. NUNNALLY: F.

Q (By Mr. Nunnally) Mr. Hernandez referred to a letter dated September 10, 1973 to you where several charges are discussed. Have you found that?

[33] A Uh-huh.

Q The first one was a Mr. Servando Alaniz.

A Yes.

Q Do you recall what your determination was in Alaniz' case?

A No, I don't.

Q Do you recall what your determination was with regard to any of the other charges that are listed in that letter?

A No.

MR. NUNALLY: We have no further questions, Your Honor. Pass the witness.

REDIRECT EXAMINATION

BY MR. HERNANDEZ:

Q Mr. Ray, Mr. Ferguson and Mr. Chamberlin worked for the company General Telephone, did they not?

A Yes.

Q Do you know now that Mr. Ferguson was promoted into management subsequent to the time that you investigated this matter? Do you know that?

A No.

Q Do you know where Mr. Chamberlin is with the company?

A No.

Q Did you consider the charge filed by Mr. * * *

* * * *

[Testimony of Mariano Falcon, Transcript pp. 36, 41-42, 124-125, 347-348]

[36] MR. HERNANDEZ: We would call Mr. Falcon, Your Honor.

MARIANO SALOME FALCON,

having been previously sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. HERNANDEZ:

Q Will you state your name, please?
A Mariano Salome Falcon.
Q Mr. Falcon, how old are you?
A 34, be 34 this month.
Q Where were you born?
A I was born in Kinney County, Brackettville, Texas.
Q And who were your parents?
A Rosalio M. Falcon, Feliz Avila Falcon.
Q Where is Brackettville, Texas?
A It's located—well, 200 miles west of San Antonio.

* * * *

[41] Q So when did you go and have your first contact with General Telephone Company?

A I believe the first contact that I had with General Telephone was through Mrs. Helen Soto, which in turn Mr. Medrano introduced.

Q And where was that at?

A I don't recall whether that was down at the agency or down at General Telephone.

Q Now, did you make an application for employment with General Telephone?

A I don't recall.

Q Were you employed by General Telephone?

A Yes.

Q Did they explain to you that they were having any type of special recruitment at the time?

A Through Mr. Medrano and Mrs. Soto I got the impression that they was—this was an experimental type of thing they was doing for Mexican-Americans.

Q And were you ever informed by anyone at General Telephone that you were to report to work or to training?

A I was.

Q And did you report to work?

A I reported to school.

Q What kind of school did you report to?

[42] A Construction Fundamental School.

THE COURT: What?

THE WITNESS: Construction Fundamental School.

Q (By Mr. Hernandez) And how many people were in your class?

A I believe there was fourteen.

Q How many of those were Mexican-Americans?

A I believe there was eleven Mexican-Americans, two Negroes and one Caucasian.

Q Where was this school conducted at?

A In Ramada Inn in Irving, Texas.

Q How long did the school last?

A Three weeks.

Q What was the general purpose of the school? What did you learn there?

A There they told us when we went out there that the job that we was going to do would consist of construction, line work and that school pertaining to line work described the practices and safety and topics on lineman work.

Q Were you at any time instructed as to the policies and practices of General Telephone pertaining to promotion?

A I don't recall.

* * * *

[124] Q I beg your pardon?

A I had heard about him.

Q And he was a management employee?

A Yes.

Q Did you know a Mr. Humberto Tagua?

A Yes.

Q Do you know whether he has been promoted to a management job?

A No, sir, I don't know.

Q You don't know? All right.

Now, you have stated that it was your understanding that it was not the policy to transfer or to promote tranfers. Am I correctly stating that?

A To promote transfers?

Q Yes, or to transfer people for promotion, you stated, was a company policy not to do that?

A Oh, no, that's on bid jobs, being accepted on bid jobs, transfers.

Q I see. I see. Mr. Falcon, when you began working at General Telephone do you know how many other Spanish surnamed Americans were working there?

A No, sir.

Q Did you know any other Spanish surnamed Americans there?

A Other than the two men that come in with [125] me I didn't know nobody else.

Q Are those two men still with the company?

A No, sir.

Q Did you know any other Spanish surnamed Americans who had applied for work with the company?

A No, sir.

Q Do you know any today who have applied for work with the company but who have been turned down?

A No, sir.

Q Do you know any other Spanish surnamed employees today?

A Yes, sir.

Q Who are they?

A I know Louis Flores in the stockroom. I know two other men, but I don't know their names.

Q Have you ever talked with them?

A Yes, sir.

Q Do you know Mr. Sanchez?

A I do. I know another man in construction, Richard Gonzales.

Q Do you know Mr. Rubio?

A Yes, sir.

Q And they are both, Mr. Sanchez and Mr. Rubio are both management employees, are they not?

A Yes, sir.

* * * *

[347] FURTHER DIRECT EXAMINATION

BY MR. HERNANDEZ:

Q Mr. Falcon, did you ever train linemen while you were a lineman in charge?

A I did.

Q How many linemen have you trained during the time you were lineman in charge, approximately?

A Nearly all the new personnel that come into the Irving Division under lineman or groundmen, I nearly got all of them.

Q Does the General Telephone Company of the Southwest in the Irving Division when it was inclusive in 1969 and also after it was divided sometime later, was there any policy that says you have to live in Irving in order to work for GTE there in Irving?

A No, it doesn't.

Q They draw the employees from the entire Dallas/Fort Worth area, do they not?

A They do.

Q Now, I believe you heard Mr. Sumner testify that he had been in your house one time. Do you recall that?

A That's right.

[348] Q And would you explain to the Court the reason for coming to your house at that time?

A Mr. Sumner come to my house that time to take me out to dinner which is awarded by the company after five years of service.

Q Has he been to your house at any other time?

A No, sir.

Q Have you ever recommended any Mexican-Americans to apply for employment with the General Telephone Company?

A I have.

Q Did you recommend them to apply for employment in any stated job?

A Installer/repairman.

Q What job would that be?

A Installer/repairman, group 1.

Q Did you ever recommend anybody for any other jobs?

A No, sir.

Q Did anyone ever explain to you at the time that you were either being considered for a management position or when you requested to be considered for a management position what MBO meant?

A No, sir.

* * * *

[Testimony of Jake Goldston—Transcript pp. 162-213]

[162] JAKE LOY GOLDSTON,

having been previously sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. NUNNALLY:

Q Would you state your full name for the record, please?

A My name is Jake Loy Goldston.

THE COURT: Now, would you try to speak a little louder and into the loud speaker?

THE WITNESS: Yes, ma'am.

THE COURT: Goldston?

THE WITNESS: Goldston.

THE COURT: What's your first name?

THE WITNESS: Jake, (spelling) J-a-k-e-, (spelling) L-o-y.

Q (By Mr. Nunnally) Mr. Goldston, do you go by your middle name of Loy?

[163] A Yes.

Q Where are you employed?

A I live at 3002-A Belvedere in Irving.

Q Are you married?

A No.

Q Where are you employed, Mr. Goldston?

A General Telephone Company.

Q And in what capacity?

A I am a division construction supervisor.

Q How long have you been with General Telephone Company?

A Eighteen years.

Q Prior to that with whom did you work?

A Oh, I held various jobs after I got out of the Service. I went to work at Johns Manville in Denison,

worked a couple of years there, hauled freight when I got out of high school. That's about all the jobs I've held.

Q How long were you in the Service?

A Two years.

Q What was your rank when you were discharged?

A I was a Specialist 4th Class.

Q What was your first job assignment with General Telephone?

A I was a groundman.

[164] Q How long have you been a division construction supervisor?

A Since 1969, seven years.

Q And have you been in the Irving facility all that time?

A Yes, uh-huh.

Q What training did you receive with General Telephone to prepare you for the job of division construction supervisor?

A Well, I was a construction foreman in the Denton Division for four years, or for three years, then I was a cable foreman for a year there before I became a division construction supervisor.

Q In connection with your work as a supervisor for General Telephone, have you had any training in equal employment matters?

A Yes, sir, I have.

Q What did this training consist of?

A Well, it was a company sponsored training we had, I believe it was in '71 when Helen Soto presented a program to all the management people there in Irving.

Q And Ms. Soto, I believe Mr. Falcon testified, was the personnel relations manager for General Telephone?

[165] A Yes, uh-huh.

Q In your role now as division construction supervisor I take it that by the title itself you are in a supervisor role?

A Yes, sir.

Q And what are your duties?

A I supervise, I have responsibility of the engineering, cable splicing in the construction departments there in the Irving Division.

Q Do you actually go out on the jobs, or is your work in the office?

A Well, I do a little bit of both. I go out with the foreman and inspect jobs, and, of course, I do my paperwork, naturally.

Q Are there other supervisors between you and the employees who do the work?

A Yes. I have a first line foreman who is over the construction personnel, a cable foreman who is over the cable splicing group, and a project coordinator who is over the engineering group.

Q You are a second line supervisor?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q And as a second line supervisor do you have [166] any role in disciplinary actions?

A Well, I directly, I don't get involved into it until the first line brings it to my attention that we have a problem, and then I do get involved in it, yes, sir.

Q Do they bring all of the disciplinary problems to your attention?

A Yes, sir.

Q Have you had—do you know the Plaintiff in this case, Mr. Falcon?

A Yes, I do.

Q How long have you known him?

A Since 1969, I believe it was when he came to work.

Q Did he work under your supervisor at that time?

A Yes, he did.

Q How long has he been under your supervision?

A The entire time with the company he has been there in Irving.

Q And you were his second line supervisor the entire time?

A Yes, sir.

Q Were you ever involved in any disciplinary actions concerning Mr. Falcon?

[167] A Yes, sir, I was.

Q Would you tell the Court what those were, please?

A I believe the first disciplinary action we took against Mr. Falcon was concerning misuse of a company credit card. Then we had the incident with wasting time on the job, and then the latest was with the cut sewer line.

Q Did the company make an estimate of what the cost was of the cut sewer line?

A Yes, sir. It was right at $3,000.00.

Q And what was the reason for the disciplinary action against Mr. Falcon with regard to the sewer line?

A Well, the company felt that Mr. Falcon didn't use proper judgment in reporting the accident or the incident to someone who could have taken care of it, and as a result of it we had quite a bit of damage to carpet, well, water backing up into a little shopping center.

Q Did Mr. Falcon report the incident to anyone?

A Not to my knowledge.

Q How did you find out about it?

A I found out about it through his foreman.

Q Are you aware of how the company found out [168] about it?

A Well, we were called down there, I believe, someone from down there called.

Q Someone from your customer?

A Yes, uh-huh.

Q And your customer's property was damaged by the sewer line?

A Yes, right.

Q Have you ever worked with Mr. Falcon when he was in a supervisory capacity?

A Mr. Falcon was left in charge by his foreman on a couple of occasions. That's the only direct dealings I've had with him.

Q Would you explain to—would you tell the Court what your—what type of work he did when he was replacing his supervisor and what your relationship with him was?

A Well, he was responsible for directing of the crews, the construction crews out, giving work to them to do, for them to do at the time in the absence of his supervisor.

Q And were you directly in charge of him then?

A Yes, I was.

Q Were you able to observe his supervisory [169] abilities and his leadership characteristics?

A No, sir, I never was around him. Our offices were separate as far as the buildings were concerned, and I only talked to Mr. Falcon on the phone a couple of times, you know, called him for questions, with questions and answers.

Q Did you have any difficulty in communicating with him?

A Well, he—not as far as difficulty, I don't know. He was restricted to a yes and no type of answer.

THE COURT: He was what?

THE WITNESS: Restricted to a yes and no type of answer.

Q (By Mr. Nunnally) Would you elaborate on that?

A As far as getting into any elaborate conversations with him, I didn't.

Q Would you say you had difficulty getting from him information you needed?

MR. HERNANDEZ: I am going to object, Your Honor, to the leading.

THE COURT: I'll overrule the objection, because I'd like to know myself.

A He answered all the questions that I had for [170] him at that time, yes, he did, with a strictly yes or no type of answer.

Q (By Mr. Nunnally) Do you have any role in the promotion process at General Telephone?

A Yes, sir. I take recommendations from the first line foreman and go over them and make my recommendations from that to my supervisor in the area office in Lewisville.

Q Now, has there been a change in the promotion process from 1971 to what it is today?

A No, sir. As far as my part of the recommendations, it's still the same. I still recommend, send the recommendations to the area office.

Q Now, does the area office generally take your recommendation?

A Well, at this time, of course, the area office personnel department handles all recommendations. They interview all applicants for supervisory jobs. And we all kind of compare notes, you know, with what we come up with as far as recommendations are concerned.

Q So at this time, then, it is a joint decision between you and the area personnel office?

A Yes.

Q In 1971 was that true?

A No, sir.

[171] Q How was it handled then?

A Well, I would take the recommendations that I had and go to my supervisor, and he would go to his supervisor, and basically that's about as far as it went up to—

Q Who made the ultimate decision as to who would be promoted?

A It was up to at that time our engineering and construction manager in the area office who gave us the final yes or no on all management recommendations and promotions.

Q Are there different procedures for promotions within the union jobs?

A Well, of course, our union bargaining unit is strictly job bids and transfer requests as far as getting promotions into higher paying positions.

Q And what is the criteria for selecting among those who have bid for jobs?

A Well, we go by seniority, and past experience in any job related or any related type of work that they have bid on.

Q So it's not just strictly a seniority decision?

A No, sir. Some of it is based on the man's qualifications.

[172] Q What is the criteria that is used to select people for management?

A Well, sir, we go on the man's past experience, his past record, and any kind of experience he may have had relating to any type of supervisor work.

Q Is seniority a factor or a criteria in selecting people for management, other than as it may relate to experience?

A No. We don't go by seniority when it comes to selecting supervisors.

Q When you select supervisors, do you try to assess their leadership qualities?

A Yes, we do.

Q And what do you look at there?

A Well, of course, I look at the ability for an individual to be a leader, his judgment factors, his ability to communicate with other departments and other department heads, and naturally the people on his own level as far as first line foreman, and their abilities to get the job done.

Q Have you ever, or are the people who are promoted from bargaining unit jobs into management, are they recommended to you by the first line supervisors?

A Yes, sir.

[173] Q Have you ever had an opportunity to consider the Plaintiff, Mr. Falcon, for a management job?

A Yes, I have.

Q And was he recommended by a supervisor?

A Yes.

Q On how many occasions, would you say?

A Two different occasions.

Q Which supervisors recommended him?

A I believe the first one was Mr. Hamrick, and the second one was Mr. Sumner.

Q What job did Mr. Hamrick—or when did Mr. Hamrick recommend him for a management job?

A I'm not too sure of the date. I believe it was somewhere around 1971, somewhere in that neighborhood.

Q During the time that that recommendation was made to you, did any management jobs open? Let me rephrase it.

A I'm not too sure, you know, the time.

Q Was Mr. Falcon considered for any management jobs at that time?

A Well, I did receive a recommendation from Mr. Hamrick on Mr. Falcon.

THE COURT: You what?

[174] THE WITNESS: I received a recommendation, management recommendation.

THE COURT: You just received it?

THE WITNESS: In 1971, yes.

Q (By Mr. Nunnally) And did Mr. Hamrick recommend others at the same time?

A I don't recall. I don't remember whether he did or not.

Q Okay. Were there others who had been recommended previously who had not yet been selected for management?

A Yes, I had, oh, Mr. Sumner had submitted some—no, I am sorry. Prior to Mr. Falcon's being recommended, I don't recall.

Q At the time Mr. Hamrick recommended Mr. Falcon for a management job do you know who was selected for that particular job?

A Let's see. I believe we put—let's see. Jerry Eden was promoted into a—

THE COURT: Who?

THE WITNESS: Jerry Eden, (spelling) E-d-e-n, Felix Sowell was promoted. Jerry Hoffman was promoted. Those three individuals.

Q (By Mr. Nunnally) What were Mr. Eden's qualifications for management?

[175] A Mr. Eden had had, I believe, four or five years' experience with a contractor who did work for the telephone companies prior to coming to our employ.

Q And what was the nature of that experience, prior experience that Mr. Eden had?

A Well, he was a foreman with the last contractor that he worked with. He was a foreman for that company.

Q So, then, he had previously been in a management or supervisory position?

A Yes, sir.

Q Do you know what his educational level was?

A No, sir, I don't recall.

Q What were Mr. Hoffman's qualifications for management?

A Mr. Hoffman had only had—he had had training in electronics and a couple of years of college, I believe, is the only background he had.

Q Had he had experience in the Military?

A Yes, he had.

Q And he had had experience in electronics there?

A Yes.

Q And what experience had Mr. Sowell had?

[176] A Mr. Sowell also had been in the Service, I believe was retired from the Service and had supervised people in the Service.

Q He had retired from the Service after 20 to 30 years of Service?

A I believe it was 20 years, yes.

Q And he had served in a non-commissioned officer's role there?

A I believe that's correct, yes.

Q Do you recall whether your records reveal whether Mr. Falcon had had any supervisory experience prior to coming to General Telephone?

A I don't believe it reflects any, no, sir.

Q How did you assess Mr. Falcon's communicative skills compared to Mr. Eden, Mr. Hoffman and Mr. Sowell?

A Well, I never did get into a lengthy conversation with Mr. Falcon hardly at any time. I always got the impression that he wasn't the type to communicate a whole lot with people, other than the people he worked with on the crews, probably.

Mr. Eden and Mr. Hoffman were right the reverse as far as being able to communicate with myself and the people in the other departments.

Q Was it your judgment, then, in making your recommendation for these management positions that [177] Mr. Eden, Mr. Hoffman and Mr. Sowell were more qualified than Mr. Falcon?

A Yes.

Q And this was based on the factors that you have told us about in your testimony here?

A Yes, sir.

Q Do you know whether Randy Raley was ever promoted to a management job?

A No, sir, not to my knowledge.

Q He was not while he was under your supervision?

A No, sir.

Q And he was not promoted to a management job in Irving?

A No, sir.

MR. NUNNALLY: Pass the witness, Your Honor.

THE COURT: I think that we will recess after this witness finishes. So, if you would like to dismiss those witnesses, it would be all right with me.

MR. NUNNALLY: I think they all rode together, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. HERNANDEZ:

[178] Q Mr. Goldston, you started as a lineman?

A Yes, sir.

Q As a groundman, I am sorry?

A As a groundman, yes, sir.

Q And what year was that?

A 1956.

Q What training had you had prior to going to work for General Telephone in the telephone business?

A I had no prior training to that, no, sir.

Q You had graduated from high school, I believe, and indicated you had been in the Service a couple of years?

A Yes, sir.

Q How old were you when you went to work for General Telephone?

A I believe I was 19—18 or 19.

Q Did you go to a training school for groundmen?

A No, sir.

Q How did you learn to be a groundman?

A Well, a groundman is nothing more than a helper's job, and there was no training for that type of job.

Q Is there training now for groundmen?

A No, sir.

[179] Q Were you aware that Mr. Falcon went to a special three week course to learn how to be a groundman?

A That school was designed to be a lineman, a line worker. It is a pole climbing school and gets him ready for a lineman's job.

Q Was that school in existence at the time that you went to work for General Telephone?

A No, sir.

Q Now, after being a groundman were you promoted?

A I received a lineman's job on the job bid, through the job bid procedures.

Q And you bid on—how long were you a groundman before you became a lineman?

A A couple of weeks, I believe.

Q And how long were you a lineman?

A I was a lineman until I got promoted in supervision in 1965.

Q You went directly from being a lineman to being a supervisor?

A It's a first line foreman, a construction foreman, yes, sir.

Q Which is a management job?

A Yes, sir.

[180] Q You were not a lineman in charge at any time?

A Well, I was a lineman in charge, oh, about six months prior to going into supervision.

Q Now, as a lineman in charge you had people under your supervision and control, did you not?

A Yes, sir.

Q And how many people did you have under your supervision and control?

A No more than four at one time.

Q Did that give you some training in order to perform your job functions as a supervisor in the future?

A Yes, sir, it did.

Q So being a lineman in charge is a good background for potential leaders?

A Yes, sir, it does help, yes, sir.

Q Now, you went from being a lineman in charge in 1965 to the position of construction supervisor?

A Construction foreman.

Q Construction foreman?

A Yes, sir.

Q Did you go to any schools to learn how to be a construction foreman?

A No, sir.

[181] Q Did the company at that time offer any training to teach you how to be a construction foreman?

A No, sir.

Q Does the company offer any schools or training at this time to teach you how to be a construction foreman?

A Well, not any particular schools are available, other than all of them that you get from the time that you go to work until you make supervisor jobs.

Q Are there any schools, to your knowledge, where employees can go to learn management techniques or to learn supervisory techniques?

A No, sir. Are you speaking of craft people, sir?

Q I am speaking of people who would be in the position, craft people position of lineman in charge where they would have four, maybe five people they would supervise and are trying to get into the management level.

A Okay.

Q Any of those kind of schools?

A No. We have no entry schools into supervision.

Q After being promoted to construction [182] foreman did you receive any other promotions?

A I was construction foreman for three years, and then I went to a cable foreman's capacity. At that time that was one pay step higher, but now they are the same pay.

Q But still within management, now?

A Yes, sir.

Q And as a cable foreman did you go to any schools or training to teach you to be a supervisor or management person in the cable foreman area?

A I haven't attended any cable splicing schools, no, sir.

Q You became foreman of the cable and splicing department without having gone to any of those schools?

A Yes, sir.

Q And where did you learn how to be a foreman to do that?

A Well, I was fortunate that the people I had working for me at Denton were people who had twelve to fifteen years' splicing experience, and it was just a matter of leading the people rather than telling them what to do.

Q After being cable foreman what was the next promotion you got?

[183] A I went to a division construction supervisor's job in 1969.

Q Is that the same job you hold now?

A Yes, sir.

Q Did you go to any management training schools before you became a division construction supervisor?

A Yes, sir. I attended some management training in Lewisville. I don't recall what year it was, but I have had some management training courses, yes, sir.

Q And you got that between the time you were cable foreman and became a division construction supervisor, or after you were a supervisor?

A That was before. I have had before and after both.

Q How many people are within your supervision now?

A I have approximately 20, 25 people. This is counting supervisors and clerical work.

Q Are you familiar with the policy that the policy was following pertaining to the disciplinary actions that were given to employees and how they should be considered for future references?

A Yes, sir, I am.

[184] Q And Plaintiff's Exhibit Number 15 heretofore entered set out that policy that once the discipline had been administered it should be forgotten and not used for anything else, is that correct?

A Yes, sir, that is correct.

Q So once that Mr. Falcon was given a disciplinary letter for misuse of the credit card, that should terminate that as far as his relationship with the company in future promotions were to be affected, would it not?

A Yes, sir.

MR. NUNNALLY: Your Honor, I will object to that. I don't believe it says that it should relate to future promotions.

THE COURT: I didn't understand you.

MR. NUNNALLY: I said, I will object to that, because the document itself does not state that it should not be used with regard to future promotions. It says that it should not prejudice the relationship between the supervisor and the employee.

THE COURT: I would say that the document speaks for itself and would sustain your objection to the question.

MR. NUNNALLY: Thank you.

[185] Q (By Mr. Hernandez) Well, let me ask you this, then: The purpose of that policy, is it not, is so that once an employee is disciplined it does not prejudice anything he is going to do in the future with the company?

A Well, our company, our policy concerning disciplinary action is based primarily on an employee and any problems he might have. We look at a disciplinary procedure as a form of communicating with an employee that you have done something wrong, and we need to correct it. And over a period of time if he gets enough disciplinary action brought against him, then termination does come about.

Q The policy says that if it is not forgotten future relationships with the employee can become prejudiced. What do you understand that to mean?

A Well, I take that to mean that in Mr. Falcon's case if he gets a disciplinary letter this year, next year I don't view that as being a part—the part of the next disciplinary action taken against him.

Q Would it have any effect on his promotion?

A It would depend on how severe a disciplinary problem we had, if it affects his judgment or what it affected.

[186] Q As the construction supervisor and being supervisor for Mr. Falcon, do you have occasion to participate in the annual evaluations of Mr. Falcon?

A Yes, I do.

Q And did you rate his abilities for leadership and other categories?

A His first line foreman does the rating on him, yes, sir.

Q And then you meet with the first line foreman and review those ratings, do you not?

A Yes, sir, I do.

Q And then you have to sign off on the evaluation, do you not?

A Yes, sir, I do.

Q And if you disagree with the evaluation you recommend that it be changed?

A I don't—I may question some ratings on employees, but unless I have something definite that would cause it to change, I don't have anybody change any ratings, no, sir.

Q So, then, on Mr. Falcon's employee ratings where you have signed off, you then are in agreement basically with how his first line supervisor rated him?

A Yes, sir.

Q Were you familiar with the fact that Mr. [187] Falcon had worked in some sort of construction capacity and had been a welder prior to coming to General Telephone?

A Yes, sir.

Q And were you familiar with his supervisory experience as being a lineman in charge?

A Yes, sir.

Q Were you familiar with his leadership qualities?

A Yes, sir.

Q And his ability to communicate?

A Yes, sir, as far as communication is concerned, I'm sure that you—well, I'm sorry, I don't really know what you mean as far as communication. On what level?

Q Well, I believe that you testified on direct examination one of the criteria used to determine whether or not a person should get into management is his ability to communicate. And I was wondering what type of cri

teria, what do you look for when you are determining a person's ability to communicate?

A I feel that a man, an individual needs to be able to communicate on a one to one basis with all level of management, upper management, other departments, because it is a requirement that they deal with [188] other departments in the company.

Q Are there any tests or any type of examinations given to determine the individual's ability to communicate?

A No, sir, not to my knowledge.

Q You just make this determination out of your general experience with the employee?

A Yes, sir.

Q Of course, you are familiar with Mr. Falcon's ability to get the job done, were you not?

A Yes, sir.

Q And what is your opinion of Mr. Falcon's ability to get the job done?

A Based on his rating I would say Mr. Falcon is a fairly average employee.

Q And this rating that you refer to, that is a rating that is arrived at how?

A Based on what feedback I get from his first line foreman.

Q Is there a point system involved in the objective rating?

A I am sorry, I don't understand what you mean point system.

Q Well—

THE COURT: How much longer do you think [189] you will be, Mr. Hernandez?

MR. HERNANDEZ: I would imagine it's going to be fifteen minutes or thirty minutes.

THE COURT: All right. We will recess at this time. You may step down until—now, I have a revocation hearing at 9:30. So we will recess until 10:00 o'clock in the

morning. The witnesses as well as the other parties should return at that time.

(There was an adjournment to October 22, 1976 at 10:00 o'clock A.M., at which time the following proceedings were had:)

CROSS EXAMINATION (Continued)

BY MR. HERNANDEZ:

Q I believe, Mr. Goldston, I was asking you yesterday about the ability to communicate and how you measured that ability among the people who were being considered for management promotion positions. How did you measure that?

A Well, I gauge a man's ability to communicate by his ability to talk with the people in higher job positions, upper management, with other departments.

Q Now, is there any testing done, any type of objective testing such as English language tests or [190] any type of tests at all dealing with the person's ability to communicate?

A No, sir.

Q Does every person who is considering the promotional applicant make his own independent judgment of this applicant's ability to communicate?

A Now, we submit all recommendations to our area office in Lewisville, and they do their own interviewing of the applicants.

Q So if there were three supervisors who were going to be making recommendations, it's possible that there would be three different standards of a person's ability to communicate that would be utilized?

A I am sorry, I don't understand the question, sir.

Q So if there were three supervisors, yourself, and two other line supervisors who were making recommendations, each one of you would have your own standard as to how you would judge this individual's ability to communicate?

A Well, the only thing I would have to judge by would be the recommendations made by the first line foreman since I am not in direct contact with the individual.

Q I believe you also indicated yesterday that [191] you considered Mr. Falcon to be an average worker?

A That's his present rating, yes, sir.

THE COURT: I would like to ask you, who makes the final determination for a promotion? Do you make the final determination?

THE WITNESS: Well, I make my recommendations to my immediate supervisor. Then he carries it on up through the lines or organization.

THE COURT: Who makes the final determination?

THE WITNESS: It's a concentrated effort with two people in the personnel department and myself.

Q (By Mr. Hernandez) I'm going to show you what has been marked as Plaintiff's Exhibit Number 11 and ask you if you can recognize that as your signature on a letter to Mr. Falcon dated February the 11th of this year?

A Yes, sir, that's my signature.

Q And in that particular letter I think you are commending him for doing an outstanding job in identifying and cutting over the working cable pairs?

A Yes, sir.

Q Did he do an above average job on that job?

[192] A What we did, to explain a little what they were doing, we were trying a new type of machine to cut around toll cables without losing service in them, and Mr. Falcon was one of the workers involved in it. And they all received the same letter.

Q All right. Now, you have a letter dated May the 6th of 1975 to Mr. Falcon for the East Office EXA Cutover in Irving. Did everyone receive that letter, also?

A Yes, they did.

Q Did you have any particular knowledge of Mr. Falcon's abilities in that letter?

A I am sorry, I don't understand your question.

Q Did you have any personal knowledge of Mr. Falcon's abilities in order to write this letter?

A That letter was recommended and drawn up by the supervisor on the job at that time.

Q I believe you indicated that Mr. Sowell, Felix Sowell when he was promoted over, or promoted when Mr. Falcon was being also considered for that job, that he had higher qualifications than Mr. Falcon, in your opinion?

A Yes, he did.

Q And what were those higher qualifications, [193] exactly?

A Mr. Sowell had had previous training in the Military. I believe it was 20 years in the Military, and he had been supervising people.

Q What capacity had he been in in the Military?

A I believe he was a Sergeant.

Q Had he worked in the telephone industry or communications field in the Military?

A I'm not sure. I don't remember.

Q He had not worked for the company very long at the time he was promoted, had he?

A I don't recall what—when it was that Mr. Sowell came to work with the company.

THE COURT: How do you spell his name?

THE WITNESS: (Spelling) S-o-w-e-l-l.

Q (By Mr. Hernandez) He was promoted to what position?

A He was promoted to a crew foreman.

Q And what position does he occupy now?

A He is a lineman.

Q And what's the reason that he was demoted?

A We had a cut-back in our work force.

Q And when did that occur?

A About two years ago, eighteen months ago.

[194] Q Has anyone been promoted to crew foreman since then?

A No, sir.

Q Is the company at this time hiring? Are you hiring any applicants?

A Yes, sir, we are hiring. In my particular department right now in Irving I'm not hiring. I don't have any openings right at this time except to have one job bid up for a cable splicer.

Q Now, Mr. Hoffman, he was also promoted at the time that Mr. Falcon was being considered, was he not?

A When was—was it '71 that Mr. Hoffman was promoted? It was late '71 when Mr. Falcon was recommended for management.

Q And do you know how much electronics experience Mr. Hoffman had had?

A He had had a couple of years of it, I believe, in the Service.

Q Had he had any telephone company experience?

A No, sir.

Q I believe you mentioned that he had had a couple of years of college. Do you know what field that was in?

A No, sir, I don't right offhand, no, sir.

[195] Q Was his college education a factor in considering his abilities for being promoted?

A Yes, sir, I believe it was.

Q How about Mr. Sowell, did he have any college education?

A No, sir, not to my knowledge.

Q How much importance on college education is given by you in determining whether or not a person is to be given credit for that in order to be promoted?

A Well, a college education, of course, would have to be something somewhat related to electronics, telephone industry or something of that nature.

Q Well, how much weight do you give college education?

A I am sorry, but I don't understand how you—what—how much weight, I don't know how to answer that.

Q Well, in making your recommendation for promotion you listed six criteria, including past experience and

past record, supervisory experience, leadership qualities, ability to communicate, ability to get the job done, and now I suppose we are adding a college education.

What I am asking is, in those criteria how much importance do you put on a college education in [196] considering a person to be promoted?

A From my level a college education would have to include electronics training or something, you know, to do with the telephone industry.

Q When someone is being considered for a promotion and these criteria are being followed, is there any objective numerical system that is utilized to compare the applicants?

A Numerical system?

Q Yes.

A Not to my knowledge, no, sir.

Q I am going to show you what is part of Plaintiff's Exhibit Number 1 under Tab A and ask you if you can recognize what this document is?

A Yes, sir, that's an employee performance review.

Q And what are these numbers that are written after these—in these boxes?

A Those are grades. At that time when we were using this form here, the general office in San Angelo did that grading. We did not do that out in the field.

Q And then these were added up and indicated the employee's efficiency rating, do they not?

A I believe they used that as criteria to [197] determine if there was an average, above average, below average.

Q Are you aware of any similar type of form or grading system that is utilized to compare employees who are up for promotion?

A No, sir, I'm not aware of anything.

Q Now, I believe on direct examination you indicated that Mr. Falcon, one of his weaknesses is that he had no prior management experience. Is that correct?

A He had no prior management experience. I don't know if you would consider that as a weakeness or not.

Q Well is not the fact that he was a lineman in charge and had four or five people under his supervision for numerous years, does that not give him the managerial experience in handling people in a supervisory capacity?

A That would give him some. It doesn't give him the opportunity to get into the direct supervision by means of dealing with anybody other than a first line foreman or giving any kind of disciplinary action to any employee.

A lineman in charge is a position that we use to put a lineman in and give him an in-charge differential pay. And he is in charge of a particular [198] crew, and his first line foreman lays out the work that he wants done, and the lineman in charge takes the work print and the people and does the job.

Q And he has to coordinate and supervise the people that are working under him?

A Yes, he does.

Q Now, when Mr. Falcon first became a lineman in charge, were you aware of any problems dealing with the people who were under his supervision not wanting to follow his orders and instructions?

A No, sir, I wasn't.

Q Do you know where Randy Raley is in the company now?

A I believe Mr. Raley is in Carrollton as an installer/repair person or a cable splicer. I'm not real sure.

Q Was he ever promoted into a management position?

A No, sir, not to my knowledge.

Q Let me ask you, Mr. Goldston, do you have any Mexican-Americans who are friends of yours?

A Yes, sir.

Q What type of friendship relationship do you have with them?

A Well, I'm not sure I understand what you [199] mean. Socially, I have been out with them, yes.

Q And are those people who work for the company?

A Yes, sir.

Q Have they been on company matters?

A Well, it's been on both, company and non-company matters.

Q And who would those people be?

A Mr. Rubio.

Q Is that John Rubio?

A Juan Rubio, yes, sir.

Q And who else?

A He is the only one that I have ever gone out with socially.

Q Have you ever visited in his home?

A Yes, I have.

Q Has he visited in your home?

A Yes, he has.

Q Do you have any other friends who are Mexican-Americans that are not related to the company in any fashion?

A No, sir, I don't.

Q How long have you known Mr. Rubio?

A Approximately three years.

Q And during those three years how many times [200] has he visited in your home?

A I don't recall. He will drop by the apartment. We would be going out to drink a beer or something. I don't recall how many times.

Q How many times have you visited in his home?

A I've been there a couple of times to his apartment.

Q Have you ever had any courses dealing with the Mexican-American culture?

A No, sir.

Q Did you ever have any Spanish language courses?

A No, sir.

Q Have you ever had any educational opportunities or any educational instruction dealing with Mexican-Americans or Spanish surnamed Americans?

A No, sir.

Q Were all the applicants for management positions renewed approximately three or four months ago?

A Yes, sir, they were.

Q Was Mr. Falcon considered and given an interview at that time?

A No, sir. At the time the last incidents [201] we had concerning the sewer line problem where Mr. Falcon requested he be taken out of in-charge pay, or in-charge position and he didn't want the responsibility, it was at that time we removed his name from our management candidate list.

Q How many Mexican-Americans, to your knowledge, in the Irving Division are in management positions?

A I only know of one.

Q Who would that be?

A In the Irving Division, Mario Sanchez.

Q Now, would it be a fair statement to say that General Telephone Company in the Irving Division generally has white males in the important decision making capacities within management?

MR. NUNNALLY: I object to that, Your Honor. I think that calls for a conclusion on the witness' part.

THE COURT: I sustain the objection.

Q (By Mr. Hernandez) How many females are above you in the management ladder?

MR. NUNNALLY: Your Honor, I'll object to that. I don't think that that's relevant to this matter.

THE COURT: What is the relevancy?

[202] MR. HERNANDEZ: Well, Your Honor, I think it's—I want to—

THE COURT: We are not trying a female case today.

MR. HERNANDEZ: I understand that, Your Honor. I am trying to indicate, and I think the Plaintiff can properly indicate that General Telephone Company is generally managed by white males, and the statistics that we have put into evidence indicate that in the past five years in the Irving Division they have not hired a Mexican-American male, and that if you don't hire Mexi-

can-American males in a company that is generally run by white males, you will never get any Mexican-Americans into management positions, because females who they are hiring in the sense of what Mexican-Americans they have hired are not being promoted into management, and they are not hiring males. That's the relevancy.

THE COURT: Well, I'll overrule the objection.

Q (By Mr. Hernandez) How many females are in management positions above your position?

A Are you speaking of the Irving Division or [203] all the company?

Q All the division.

A I have no idea if there are any or not.

Q Well, do you know of any?

A No, sir, no, I don't.

Q Your immediate supervisor is a white male?

A Yes, he is.

Q And his immediate supervisor is a white male.

A Yes.

Q How many white females are in management positions below you?

A I have no idea.

Q Well, the person that you immediately supervise is a white male?

A I am sorry, when you say below me, are you talking about the Irving Division, are you talking about strictly my department, or the entire Irving Division, because there are some females in supervisory capacities in the other departments?

Q Well, let's talk first about in your department.

A Oh, okay.

Q Your division, out of the 25 or so people that you supervise, how many of those are in supervisory [204] positions that are white female?

A None.

Q Have you ever had a white female supervisor?

A No.

Q Have you ever had a Mexican-American male supervisor?

A No, sir.

Q Have you ever had a Mexican-American female supervisor?

A No, sir.

Q Have you ever had a black male supervisor?

A No, sir.

Q Have you ever had a black female supervisor?

A No, sir.

Q Now, in the Irving Division I'd like for you to tell me if you know how many white females are in supervisory positions below your position in the management ladder?

A I don't know. I don't have access to that information.

Q Do you know of any personally?

A The business office supervisors, I am not real sure what level they are on. That's in a different department.

[205] Q But you have not ever personally met a white female supervisor that was either on your level, above your level, or below your level?

A Yes, I have. I am just not sure—I am not certain what level they are at.

Q Do you know of any Mexican-American female supervisors, either above you or below you?

A No, sir, I don't.

Q Other than Mario Sanchez, do you know of any Mexican-American male supervisors either above you or below you?

A No, sir, I don't.

Q Do you know of any black male supervisors either above you or below you?

A No, sir, I don't.

Q Do you know of any black female supervisors either above you or below you?

A No, sir.

Q Do you know Mr. Robert Ferguson?

A I don't know him personally, no, sir. But he did work on a line crew in Irving at one time.

Q He worked under your supervision, did he not?

A He worked under a first line foreman. He worked not directly for me.

[206] Q You were second line supervisor?

A Yes, sir.

Q Do you know if he was promoted?

A No, sir, not to my knowledge.

Q Do you know where he is working at in the company now?

A I believe Mr. Ferguson is in Denton.

Q In the Denton Division?

A Yes, sir.

Q Do you know what his job function is?

A I believe he is a cable splicer.

Q Do you know Mr. Chamberlain?

A Yes, sir, I do.

Q Do you know where—were you his supervisor?

A Second line, yes, sir.

Q Do you know what job function he occupied?

A Mr. Chamberlain was a lineman for a while. He bid into the installation and maintenance department for a while, and then he bid into a test board job for a while.

THE COURT: What kind of job?

THE WITNESS: Test board.

Q (Mr. Hernandez) Is he still with the company?

[207] A No, sir, he isn't.

Q Was he ever in a management position?

A Not to my knowledge, no, sir.

Q Do you know a Mr. Johnny Cattrell?

A Yes, sir, I do.

Q What's his position?

A He is a cable splicer.

Q Is he under your supervision?

A Yes, sir.

Q Have you ever had a conversation with him pertaining to Mr. Falcon?

A No, sir, I haven't.

Q Have you ever had a conversation with anyone pertaining to Mr. Falcon?

A About any particular subject I've talked with his supervisor?

Q Well, just generally.

A I've talked with his supervisor, yes, sir.

Q Have you ever referred to Mr. Falcon as, "that Mexican"?

A No, sir, I haven't.

Q Do you know Mr. James Morrow?

A Yes, I do.

Q Did you have a conversation with him pertaining to Mr. Falcon?

[208] A Not that I remember.

Q Do you recall when Mr. Morrow was promoted to buried crew foreman?

A Yes, sir. He was promoted to an installation and maintenance foreman I believe is the correct title, and he transferred to Carrollton Division, or Carrollton District. And they put him in charge of a buried crew.

Q He had never been on a buried crew position, had he?

A Yes, sir. When he was a line man there in Irving he worked, helped bury cable.

Q Had he ever been a cable splicer?

A No, sir, not to my knowledge.

Q Had he ever gone to buried—or cable school?

A I don't know, sir. I'd have to look at his file.

Q He was put in in a management position as a buried crew foreman with a minimum amount of experience, was he not?

A Well, sir, he had buried cable the entire time he was in the Irving Division. And when they transferred him, or when he was transferred to Carrollton as an

I & M Foreman, he was doing basically the same [209] thing.

MR. HERNANDEZ: I'll pass the witness.

REDIRECT EXAMINATION

BY MR. NUNNALLY:

Q Mr. Goldston, outside of your department do you have any day-to-day dealings with supervisors in other departments?

A Yes, sir, I do.

Q Your department is the Engineering Department?

A Yes, sir, Engineering and Construction department.

Q And that's primarily concerning construction work?

A Well, construction, cable splicing and engineering.

Q Do you know how many female applicants there have been for the Engineering Department?

A No, sir, I don't.

Q Do you know how many black applicants there have been?

A No, sir, I don't.

Q Do you know how many Spanish surnamed American applicants there have been?

A No, sir, I don't.

[210] Q Are there female supervisors in Irving?

A Yes, sir, there is.

Q In other departments?

A Yes, sir.

Q During the past two years has the number of inspectors at Irving declined?

A We have only had one inspector in Irving at all times, at anytime, even on a given time. In the Northern Area we have only two.

Q And that number has not increased over the past two years?

A No, sir. We base our demands on inspectors. That demand is based on how much conduit we will be placing in a given area.

Q How many crew foreman are there?

A We only—there is only one crew foreman at this time, and he is being promoted to a construction foreman, and we will not be putting on any more crew foremen.

Q Has that job title been eliminated?

A To my knowledge it hasn't been eliminated, but we don't plan to fill any more vacancies.

Q There is only one crew foreman and only one inspector in Irving, and a crew foreman will soon be promoted out and there won't be a replacement, is that [211] correct?

A The crew foreman is not in Irving. I do not have a crew forman in Irving. I do have an inspector, and he works all over the Northern Area.

Q Mr. Goldston, are you familiar with the job planning course training?

A Yes.

Q Is that training for a management position?

A No, sir.

Q You indicated previously that you had had three disciplinary problems with Mr. Falcon. Did any of those disciplinary problems, in your opinion, reflect on his judgment?

A Yes, sir. The first concerning the misuse of the company credit card. The second one was wasting time, and the third was the incident with the sewer line.

Q And which of those reflected on his judgment, in your opinion?

A I would say all three of them did.

Q And what did they indicate to you about his judgment?

A Well, of course, the sewer line was a more severe in that it cost the company quite a bit of money, not—you know, not saying what the inconvenience it [212] caused our customer. But all three of them were, in my opinion, bad judgments.

Q And at the time of the sewer line incident was when Mr. Falcon was taken off the management suggested list?

A Yes, sir.

Q To your knowledge how many management positions has Mr. Falcon been considered for?

A I believe only two.

Q Was he considered for the job that Mr. Hoffman got?

A No, sir.

Q Was he considered for the job that Mr. Hamrick got?

A No, sir.

Q Who was the first person who recommended Mr. Falcon for management?

A Mr. Hamrick.

Q He was considered for the position that Mr. Eden received, is that correct?

A Yes, sir, I believe that's correct.

Q And he was considered for the position that Mr. Sowell received?

A Yes, sir.

MR. NUNNALLY: We pass the witness, Your [213] Honor.

RECROSS EXAMINATION

BY MR. HERNANDEZ:

Q Are you familiar, Mr. Goldston, with the recruiting procedures that General Telephone Company implements in order to encourage minority applicants to the company?

A No, sir, I'm not real familiar with that policy.

Q Have you as the construction supervisor in the Engineering and Construction Department been given any instructions on how to improve or recruit minority applicants?

A The Personnel Department has the responsibility of contacting any person or persons who could help in recruiting minorities.

In my department I don't—I don't, unless I have an occasion to meet with someone on a day-to-day basis, but I don't go out for that particular reason. That's handled by our—the other department, Personnel Department.

Q So I take it you have not been given any instructions or guidelines as to what you could do to help increase the number of applicants for jobs?

A No, sir.

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[Testimony of Harvey Sumner, Transcript pp. 221, 234]

[221] HARVEY RAY SUMNER,

having been previously sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. NUNNALLY:

Q Would you state your full name for the record, please, sir?

A Harvey Ray Sumner.

Q Where do you reside, Mr. Sumner?

A 4037 Victoria in Irving.

Q How long have you lived in Irving?

[222] A Five and a half years.

Q Where did you reside prior to that time?

A California.

Q Where are you employed, Mr. Sumner?

A General Telephone of the Southewest.

Q How long have you been employed by General Telephone Company?

A For twelve years.

Q Were you employed by General Telephone in California?

A Yes, I was.

Q What was you initial position with General Telephone Company?

A You mean what did I start as?

Q Right.

A Lineman.

Q And what is your position today?

A Construction foreman.

Q What is your educational background, Mr. Sumner?

A I have a high school education and approximately two years of college. I have not any degree, or I haven't finished.

Q Did you acquire your two years of college after you began working for General Telephone?

[223] A A portion of it.

Q So you had a portion of college before you started?

A Yes.

Q Did you have any military experience?

A Yes, I had two and a half years in the Army.

Q Are you married, Mr. Sumner?

A Yes, I am.

Q Do you have children?

A No, I don't.

Q Have you received any training since you have been with General Telephone Company?

A Yes, I have.

Q Would you tell the Court what that training has been?

A I have received different schools on line work, cable—

THE COURT: On what?

THE WITNESS: Line work, cable splicing.

I've gone to several engineering courses.

Q (By Mr. Nunnally) And have you received any equal employment opportunity training?

A Yes, I have.

Q Do you know the Plaintiff in this lawsuit, [224] Mr. Mariano Salome Falcon?

A Yes, sir, I do.

Q Did Mr. Falcon work for you?

A Yes, he did.

Q And when did he work for you?

A 1972, '3 and '4.

Q Now, Mr. Sumner, in your role, would you explain to the Court what you duties are as a construction foreman?

A As a construction foreman I take the engineered work prints, and we build the new construction and the outside plant.

Q And how many people do you supervise?

A At the present?

Q Yes.

A Five.

Q And what are the duty titles of the people you supervise?

A Line workers.

Q What's the largest number of people you have supervised?

A In 1971 I supervised 28.

Q And were those all line workers?

A Yes, they were.

Q What was Mr. Falcon's position when you [225] supervised him?

A Line worker.

Q Was he also a line worker in charge?

A Yes.

Q Would you explain to the Court what the difference is between the line worker and the line worker in charge?

A The line worker in charge is given a work print, and it's his responsibility to see that it is completed and that the line workers under him are working all times and kept busy.

Q And how many line workers in charge did you supervise at the time you supervised Mr. Falcon?

A I think it was five.

Q At some point in time did you—were you required to demote some of the line workers in charge?

A Yes, yes, I was.

Q And what was the reason for the demotions?

A Reduction of forces.

Q And on what basis did you make your decision as to whom you would demote?

A I took into consideration the drive the employee had, the judgment, his ability to communicate and to express himself to the people he was working with, and his ability to get the job done.

[226] Q And in addition to that had you kept any statistics on their work—on the work they had performed?

A Yes, I had.

Q How many line workers in charge did you demote?

A I think it was three.

Q And do you recall who they were?

A Mr. Falcon was one, Gary Garrison, and Richard Shaffer I think was the other.

A What is Mr. Shaffer's race?

A He is Caucasian.

Q What is Mr. Garrison's?

A Caucasian.

(Defendant's Exhibit 5 was marked for identification.)

Q (By Mr. Nunnally) Mr. Sumner, let me show you what has been marked as Defendant's Exhibit 5 and ask you whether or not you can identify that?

A Yes, I can.

Q And would you tell the Court what it is?

A It is a comparison chart that I kept during the year of 1974 on all of the line workers in charge and the jobs that they completed.

Q And you kept this personally?

[227] A Yes, I did.

MR. NUNNALLY: Your Honor, we offer Defendant's Exhibit 5.

THE COURT: Have you seen it?

MR. HERNANDEZ: Yes, I have, Your Honor. I have no objection.

THE COURT: It may be admitted.

Q (By Mr. Nunnally) Now, Mr. Sumner, on the front you have "Irving" what is the number? 5639?

A That's just the Irving Division code number.

Q You have "comparison chart line worker in charge." Now, on the second page you have written across the top, "Orders worked in 1974," and under that on the

left-hand column you have "man in charge." And you have listed under that some names. And who are those people?

A They are linemen in charge.

Q And those are on page 2 and 3?

A Right.

Q And that's S. Falcon, is that the Plaintiff in this lawsuit?

A Yes, it is.

[228] Q And then R. Shaffer, G. Garrison, and on page 3 J. Morrow and D. Fortune.

Now, the second column is a list of order numbers, is that correct?

THE COURT: Now, in the first column you have some percentages.

MR. NUNNALLY: All right. Your Honor, could we come back to that? I think it would be easier to follow.

THE COURT: Yes.

Q (By Mr. Nunnally) Order number, were those numbers assigned by the company?

A Yes, they are.

Q All right. Now, the next column is "Estimated hours." What were the estimated hours?

A That's the hours that were estimated by the Engineering Department to complete that work order.

Q And then the actual hours, what is that?

A That's the actual hours that it took the crew to get the job done.

Q And then half way down the page, or do you know the page you have in the first column, or in the second column, excuse me, just above Mr. Shaffer's name you have "total", then the number 1036 and the number 951. Is that the total estimated hours for Mr. [229] Falcon's work and the total actual hours it took?

A Yes, it is.

Q Now, back over in the left-hand corner under, column under Mr. Falcon's name you have written "9 percent under." What does that reflect?

A That shows me that he was 9 percent under the estimated hours for the time it took to complete all of the jobs that he did for me in 1974.

Q And is General Telephone like all other companies where time is money?

A Yes, it is.

Q And that's translatable to money to the company as far as the time it took to work?

A Yes, sir.

Q Now, under Mr. Shaffer you have written what?

A 30 percent.

Q And under—30 percent under?

A 30 percent under.

Q Was anybody over the estimated hours?

A No sir.

Q All right. Which one of the linemen in charge was under by the less amount, or by the least amount, excuse me.

A Mr. Falcon.

[230] Q So that his time saved was less than any other lineman in charge?

A Yes, sir.

Q And Mr. Shaffer's was the next that was the next lowest?

A Yes, sir.

Q And Mr. Garrison was the third lowest?

A Right.

Q And those were the three linemen in charge that you demoted?

A Yes, it is.

Q And Mr. Morrow saved the company the most time, is that correct?

A Yes, sir.

Q He was 42 percent under?

A Right.

Q Mr. Sumner, did Mr. Falcon subsequently—was he subsequently promoted back to lineman in charge after the time you demoted him?

A Yes, sir.

Q And then after that was he reduced again to lineman?

A Yes, he was.

Q And what was the reason for that?

A That was at his request.

[231] Q He voluntarily did it?

A Yes, sir.

Q At any time while you were Mr. Falcon's supervisor did you recommend to him, or did you recommend to the company that he be considered for a management position?

A Yes, I did.

Q And do you recall when that was?

A It was in 1973, I believe.

Q That was prior to the time you had kept the records that are reflected by Defendant's Exhibit 5?

A Yes, sir.

Q And at that time did you recommend any other persons for management?

A Yes, I did.

Q And who were those people?

A I recommended Gary Garrison, Felix Sowell and Sal Falcon.

Q And what is your role, Mr. Sumner, in the promotion process for management positions?

A Well, I just take the people that trained under my supervision and recommend them, fill out a card of recommendation and turn it over to my supervisor.

Q And of those three that you recommended, [232] did you recommend any particular one above the others?

A Yes, I did.

Q And who was that?

A Gary Garrison.

Q And when the job came open who got the job?

A Felix Sowell.

THE COURT: Who?

THE WITNESS: Felix Sowell.

Q (By Mr. Nunnally) And is Mr. Sowell still in the management position?

A No, he's not.

Q And why is he no longer in a management position?

A A reduction of work force.

Q During your supervision of Mr. Falcon did you have an opportunity to have a career awareness discussion with him?

A Yes, I believe I did.

Q And would you tell the Court what a career awareness discussion is?

A Well, you talk to the employee about the jobs that are available to him in the craft portion of the company, and you explain the ways to attain the position that they would like to finally maintain in the [233] company.

Q And what position did Mr. Falcon indicate to you that he would like to maintain?

A A cable splicer.

Q And what position does he presently hold?

A Cable splicer.

Q Did you recommend that Mr. Falcon attend any schools that would prepare him for cable splicing?

A Yes, I did.

Q And did he attend those schools?

A Yes, he did.

MR. NUNNALLY: We pass the witness, Your Honor.

CROSS EXAMINATION

BY MR. HERNANDEZ:

Q Mr. Sumner, when did you start working in the Irving Division?

A 1971.

Q And where did you work prior to 1971?

A California.

Q And what your job capacity in California?

A Lineman.

Q When you came to Irving what was your job capacity?

A Construction foreman.

[234] Q You got promoted when you came?

A Yes, sir.

Q That was the reason for coming?

A Yes, sir.

Q You started as a lineman and went to construction foreman in the company?

A Yes, sir.

Q Have you held any other positions in the company?

A No, sir.

Q Is it a policy at General Telephone to try to promote within the company, such as from groundman to lineman, to lineman in charge, to construction foreman? Is that a natural progression?

A Yes, sir, I believe it is.

Q Now, at the the time that you came to Irving in 1971 did you receive any training for supervisory positions?

A I was placed in charge in the California company as a temporary foreman, if that's what you mean.

Q No, I think before you were placed in charge did you go to any company schools and get any training on how to be a supervisor?

A No, sir.

* * * *

[Testimony of Mario Sanchez, Transcript pp. 258, 261]

[258] MARIO SOTO SANCHEZ,

having been previously sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. NUNNALLY:

Q Would you state your name for the record, please?
A Mario Soto Sanchez.
Q Where do you reside, Mr. Sanchez.
A In Irving at 3119 Walnut Hill Lane.
Q How long have you lived in Irving?
A Three years.
Q Where did you live prior to that?
A San Angelo.

• • • •

[261] Q Mr. Sanchez, since the time you have been employed by General Telephone of the Southwest have you experienced any discrimination against you because of your national origin?

A No, I haven't.

Q Do you believe that the company discriminates against any Spanish surnamed Americans because of their national origin?

MR. HERNANDEZ: Your Honor, I'm going to object to what he believes.

THE COURT: I am going to sustain the objection.

Q (By Mr. Nunnally) Have you experienced any instance where the company has discriminated against any Spanish surnamed employee because of his national origin?

A No.

Q Now, Mr. Sanchez, other than yourself, are you aware of any other Spanish surnamed employees who have been in management in the Irving Division?

A That have been in management?

• • • •

[Testimony of Juan Rubio—Transcript pp. 274, 278.]

[274] JUAN RUBIO,

having been previously sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. NUNNALLY:

Q Would you state your full name for the record, please, sir?

A Juan Rubio.

Q Where do you reside, Mr. Rubio?

A Reside at 2514 Finley Road, Irving, Texas.

* * * *

[278] Q Have you had any training since you have been with General Telephone?

A Yes, sir.

Q Have you attended schools in addition to on-the-job training?

A Yes, sir.

Q Approximately how many schools have you attended?

A Ten or fifteen.

Q Mr. Rubio, since you have been with General Telephone Company have you experienced any discrimination against you by the company or any employees because of your national origin?

A No, sir.

Q Are you aware of any discrimination by the company or any of its employees against any Spanish surnamed Americans because of their national origin?

A No, I am not.

MR. NUNNALLY: We pass the witness, Your Honor.

CROSS EXAMINATION

BY MR. HERNANDEZ:

Q Did you know, Mr. Rubio, that between the period of July 1972 and July 1975 out of 210 applications 19 of them which were minorities, 17 Mexican * * *

* * * *

[Testimony of Delores Cameron—Transcript pp. 287, 301, 317-319]

[287] DELORES CAMERON,

having been previously sworn, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. NUNNALLY:

Q Would you state your full name, please?
A Delores Cameron.
Q And where do you reside, Mrs. Cameron?
A At 2933 Canyon Creek in San Angelo.
THE COURT: You will have to talk louder than that.
THE WITNESS: All right.
Q (By Mr. Nunnally) How long have you lived in San Angelo?
A Three years.
Q Where did you live prior to that?
A In Sherman.
Q Are you married?
A Yes.
Q And do you have any children?
A Yes.
Q How many?
A Four.

• • • •

[301] A Yes.
Q And do they recruit through minority newspapers in all communities where they have offices?
A I'm not sure.
Q Do you know whether they recruit through minority newspapers in the Dallas area?
A Yes.
Q And they do?
A Yes, they do.

Q Do you know, or could you state for the Court whether the policy as far as getting into management for the company is to promote from within or to hire?

A Primarily to promote from within. There are some jobs from which we do hire mostly, but most of the jobs are to promote from within.

Q Now, in the Irving Division, would the bulk of the jobs in management be those that are promoted from within or those that you hire from outside?

A Promotion from within.

Q And do you know what the criteria is for promotion into management?

A Yes.

• • • •

[317] A In 1968 I was assistant traffic supervisor.

Q And where was that at?

A Henderson, Texas.

Q Were you in a management position in Jacksonville, Texas?

A No, I was not.

Q And in Sherman what job did you occupy?

A Operator services manager.

Q And in San Angelo?

A Personnel administrator.

Q Is that the current job that you hold?

A Yes.

Q How long have you held that job?

A I have been in the personnel department for three years.

Q How long have you been the personnel administrator?

A About a year.

Q How long have you been coordinating the investigation of EEO complaints?

A About a year, a little over a year.

Q How many complaints has the General Telephone Company had from Mexican-American or Spanish surnamed Americans for discrimination?

MR. NUNNALLY: Now are we talking about [318] the Irving Division? I think we restricted it generally to that.

MR. HERNANDEZ: Well, Your Honor, I don't mind counting apples and oranges, but if we are going to talk about an individual who applied in Irving and is now hired in San Angelo, first, I think I'm entitled to know generally whether they get a lot of complaints from Spanish surnamed Americans. I will narrow it down to Irving.

THE COURT: I will overrule the objection. However, please do narrow it down.

MR. HERNANDEZ: I will, Your Honor.

A I don't know without examining the records. I do have those records in San Angelo, but without examining the records, I wouldn't be able to say how many have been Spanish-American national origin complaints.

Q (By Mr. Hernandez) Do you have an idea as to what percentage of the total complaints that you receive are from Spanish-Americans or Mexican-Americans?

A No, I don't.

Q How many complaints have you had in the Irving Division from Mexican-Americans or Spanish-Americans?

A One.

[319] Q And when was that?

A I believe that was in 19—I don't remember the year. The complaint was Mr. Falcon's.

Q That's the only complaint that you have had in the Irving Division?

A From a Mexican-American, yes.

Q Now, and that was October 17th of 1972?

A That is probably correct.

Q In response to an interrogatory the company indicated that there were various positions that had never been occupied by Mexican-Americans. Did you prepare that list?

A That was done by, if you remember, Mr. Hernandez, on our first response to that we said we did not know for sure. Our records could not say what positions had or had not had Mexican-Americans in them, and that was done by two or three people who sat down and from memory thought, these are the positions that had no Mexican-Americans ever in them.

Q And so, then, in response to interrogatory number 23 where the white Americans are listed, if you take the jobs that never had a Mexican-American, and you compared them against that, you are going to have some jobs left over, aren't you?

• • • •

[UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION]

[Selected Trial Exhibits]

PLAINTIFF'S EXHIBIT NO. 1 (Excerpts)

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
DALLAS DISTRICT OFFICE
400A Lancaster-Kiest Shopping Center, Suite 10
Dallas, Texas 75216

CERTIFIED MAIL No.

Charge No. TDA3-0602
Case No. YDA4-649
Date Filed: 10-19-72
Date Served: 08-23-73

Mariano Falcon
Dallas, Texas
Charging Party

General Telephone Company
San Angelo, Texas
Respondent

DETERMINATION

Under the authority vested in me by Section 1601.19b of the Commission's procedural rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

The timeliness and all other requirements have been met; the Respondent is an employer within the meaning of Title VII.

The Charging Party alleges that the Respondent discriminated against him by failing to promote him because of his national origin, Spanish-Surnamed American.

The evidence supports the charge. The Charging Party was hired in July 1969 and promoted to Lineman-in-Charge on October 31, 1969, a position which he still holds. The Anglo who was promoted over the Charging Party was hired in January 1972, promoted to Lineman-in-Charge on March 12, 1972 and promoted to Inspector,

the position in question, on October 8, 1972. The Respondent states that this Anglo had more experience that Charging Party. However, a review of the personnel files of other Anglos who were promoted over the Charging Party in the past reveals that the Charging Party was more qualified, had more experience, had equal or higher evaluations and had been with the Respondent longer than the Anglos. Testimonial evidence indicates that all the employees or ex-employees interviewed feel that Charging Party was better qualified than the Anglos promoted over him. The Respondent has denied the Charging Party a promotion for apparently different reasons. Absent any evidence to the contrary, we must conclude that the Charging Party's national origin was at least a factor in his being denied a promotion since he was the only Spanish-Surnamed American involved in the above mentioned promotions, the others being Anglos.

The Charging Party also alleges that Spanish-Surnamed Americans as a class are not promoted. This allegation is not substantiated by the evidence. About an equal amount of Spanish-Surnamed Americans were promoted as are represented in the employee population. "Like and related" to and "growing out of" the instant charge is the large difference between the Respondent's Spanish Surnamed American employee population and the number of Spanish Surnamed Americans in the community. While the Respondent's Anglo work force equals about 113% of the Anglo population of the community, it's Spanish Surnamed American work force equals 27% of the Spanish Surnamed population of the community. Title VII permits the use of statistical probability to infer the existence of a pattern or practice of discrimination. See (CCH) *Employment Practices Guide* paragraph 6385 and cases cited therein.

Having examined the entire record, I conclude that there is reasonable cause to believe that Title VII of the

Civil Rights Act of 1964, as amended, has been violated in the following manner: Failing to promote the Charging Party because of his national origin and failing to hire Spanish Surnamed Americans as a class. However, there is not reasonable cause to believe that Title VII has been violated regarding: The allegation that Spanish Surnamed Americans as a class are not promoted.

Having determined that there is reasonable cause that the law has been violated, I now invite the parties to join with the Commission in a collective effort toward joint resolution of the matter and to eliminate unlawful employment practices. An information sheet titled "Notice of Conciliation Process" is attached to this letter of determination, for the information of all parties. A representative of the Commission will contact each party in the near future to begin the conciliation process; until then, no action is required of any party.

On behalf of the Commission:

/s/ Eliazar Salinas
ELIAZAR SALINAS
Deputy District Director

Date—01/29/74

I will need the following information in order to complete this charge. Please respond to each question and please respond to each question on a separate sheet of paper. If all or part of the data for a particular question is not available, please explain fully why it is not and please respond within two (2) weeks.

1. The Charging Party/Parties personnel files.
2. Your latest EEO-1
3. A statement from a company official answering, in detail, each of the allegations. Include supporting data.
4. A union contract.
5. A list of all employees in the San Angelo area. (Dallas, Brownwood, and San Angelo) Indicate name, race, sex, national origin, present position, present department, date of hire, present pay and whether union or not.
6. A list of all discharges in the above area. Indicate name, race, sex, national origin, date of discharge, department at time of discharge and reason for discharge. (For the period July 1, 1971 to June 30, 1972 only.)
7. A copy of your transfer policy.
8. A list of all employees transferred in 1971 and 1972 in the San Angelo district. (Dallas, Brownwood and San Angelo). Indicate name, race, sex, national origin, date of transfer, position transferred from and to, pay of the old position and new position, date of transfer, department transferred from and to, whether the transfer was made at the employer or employees request and whether the transfer was a promotion, demotion or lateral move.

9. A copy of your overtime policy. Have you at any time denied overtime to any group of employees? When? Why? When did you change this policy?

10. A copy of your promotion policy.

11. A list of all promotions in 1971. Indicate name, race, sex, national origin, date of promotion from and to, department from and to, whether the position is covered by the union and pay of old and new positions. (can be combined with item 8 above)

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
DALLAS DISTRICT OFFICE
400A Lancaster-Kiest Shopping Concourse, Suite 10
Dallas, Texas 75216

Certified Mail No. 312974

REQUEST FOR ADDITIONAL RESPONSE
REGARDING "LIKE AND RELATED" MATTERS

An investigation of the charges which have the file numbers listed below has been conducted. A review of the files involved revealed certain matters which are so like or related to the charges that determination concerning them may be appropriate at this time. However, since it may well be that your establishment did not previously identify these matters as being like and related to the charges served, this request for additional response is made.

It is considered that the evidence now at hand makes a *prima facie* showing of illegal discrimination by your establishment. The burden of showing why a determination of illegal employment practices should not be made concerning these matters now falls upon your establishment.

The issues concerned are the following:

a. Recruitment/Hiring (see attached)

Should any statement of position, explanation, argument, or the like, which your establishment submits draw conclusions or make statements of fact which have not previously been established by affidavits, copies of routine business records, summary statistical data, or other evidence, such conclusions and assertions must be documented by appropriate attached evidence. Your statement of position and supporting evidence must be in writing and be delivered to this address by mail or other

means no later than five days following the date of your receipt of this request.

No "hearings" or other such receipt of evidence or arguments will be entertained except as indicated herein (except as the district director may require additional investigation).

In addition, you are invited to submit any additional explanation and supporting evidence, as you may deem necessary or appropriate, concerning the specific issues set forth in the charges identified below. Reference to those issues should not be taken as a comment of any kind as to their merit under Title VII.

Your attention is drawn to Commission regulation 29 CFR 1601.19b(d) which states (*inter alia*), "The determination [as to the merits of a charge] is final when issued; therefore, requests for reconsideration will not be granted." While the same regulation permits the district director to reconsider the determination at any time on his own motion, only in extraordinary circumstances will the director move to reconsider a determination. It is, therefore, vital that your establishment respond concerning the issues described above, at this time, and that if there is desired any additional response concerning the charges served, such response is made immediately.

Thank you for your continued cooperation.

Date—01-17-74

/s/ [Illegible]
for/ Commission Representative
Tony Ray

Charge File Numbers:

TDA3 0602

Recruitment/Hiring

Documents and statistical summaries prepared by the respondent show that its employment population includes only about 27% as many Spanish Surnamed Americans as there are in the community at large. Title VII permits the use of statistical probability to infer the existence of a pattern or practice of discrimination, and this evidence suggests that there is illegal discrimination in recruitment and hiring. See Commission decision at *Employment Practices Guide* (CCH), Paragraph 6361. Where an employer has only a small number of minority persons or females employed, the employer has a responsibility of seeking to insure that those persons are fully notified of the availability of prospective employment. See Commission decisions at *Employment Practices Guide* (CCH) Paragraphs 6314, 6385, and 6387. Further, wherever an employer has employment qualification requirements such as educational requirements, general ability tests, height requirements, a pass-fail interview condition, or the like, which tends to effect one race, ethnic group, or sex, or another, more adversely than another, such a requirement must be shown to be necessary to the safe and efficient operation of the business. See Commission regulation 29 CFR 1607.

[COPY]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
DALLAS DISTRICT OFFICE
400A Lancaster-Kiest Shopping Concourse, Suite 10
Dallas, Texas 75216

Certified Mail No. 766660 Date Mailed 10-11-73

INVITATION TO MAKE FURTHER RESPONSE

To the best of my present knowledge and subject to later review of the investigation file which I have prepared, the investigation of the charges identified below is complete. By this letter, your establishment is specifically invited and encouraged to make any written statement of position and to supply any evidence which may be desired. Such additional statement and evidence will be incorporated into the investigation file or files and will be given full consideration with all other evidence gathered.

Should any statement of position which your establishment may submit draw conclusions or make statement of fact which have not previously been established by affidavit, documents, or other evidence, such conclusions and assertions should be documented by appropriate attached evidence. Any such statement and evidence should be mailed to my attention.

The file concerning the charges whose file numbers are listed below will be held open for no less than ten days following your receipt of this letter. While it is possible that no letter of determination will be issued or that the file will not be sent to the headquarters office of the Commission, as the case may be, for some time after that ten-day period, and while any statement or evidence will be accepted and given full weight until one of those two events has occurred, no assurance of any extension of that ten days will be given by the Dallas District.

Accordingly, any requests for extension will be rejected. No "hearing" or other receipt of date will be entertained except as described herein (except as additional investigation may be required by the District Director.)

Thank you for your cooperation during the course of the investigation.

/s/ Robt. A. Ray (JAU)
Commission Representative

Charge File Numbers:

TDA3 0602

GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST
2701 South Johnson Street
P.O. Box 1001
San Angelo, Texas 76901
915 949-9511

September 10, 1973

Mr. Robert A. Ray
Commission Representative
Equal Employment Opportunity Commission
Dallas District Office
400A Lancaster-Kiest Shopping Center, Suite 10
Dallas, Texas 75216

Re: Charges Numbers TDA2 1249, TDA3 0602, TDA2 0177, TDA2 1141, TDA2 0853, TDA3 0819, TDA2 0187

The following information is submitted in response to your request for the Company's reply to the allegations contained in the captioned charges.

Charge Number TDA2 1249—Servando Alaniz

Respondent submits that this complaint is moot for the reason that Mr. Alandiz, subsequent to the date of his demotion from storekeeper to stockman, which is the basis of this complaint, was promoted to the job of division supply manager. The job of division supply manager is a higher paid job than that of storekeeper and includes supervisory authority over the storekeeper job.

In regard to the demotion from storekeeper to stockman, the circumstances and necessity therefor were fully explained to Mr. Alaniz's attorney in a letter from Mr. Jack H. Ray of this Company dated August 22, 1972. A copy of that letter is attached hereto as Exhibit I and is incorporated herein as the Company's response to the

complainant's allegation that he was demoted because of his national origin.

Respondent believes the circumstances surrounding the demotion and the respondent's subsequent promotion of Mr. Alaniz show beyond a doubt that he has in all respects been treated fairly and equally.

Charge Number TDA3 0602—Mariano Salome Falcon

The respondent denies that Mr. Falcon was passed up for promotion because of his national origin and would show that the job of outside plant inspector was awarded to Jerry Eden on the basis of Mr. Eden's superior qualifications. At the time Mr. Eden was promoted to outside plant inspector he had been with the Company approximately nine months as a lineman and lineman-in-charge. Prior to his employment with the Company he had worked five and one-half years with various outside plant contractors, giving him a total of better than six years of experience with outside plant. Mr. Falcon, on the other hand, had only about three years of experience with outside plant. Mr. Falcon was hired as a groundman in July 1969 as part of Operation Attainment and promoted to lineman-in-charge on October 31, 1969. Mr. Falcon had no previous experience with outside plant prior to coming with the Company.

The job of outside plant inspector is classified as a management job and is, therefore, not covered by the Company's contract with the Union. In selecting employees for management positions the sole criterion used in awarding the job is qualification of the applicant. Seniority is not a controlling factor in awarding management jobs as it is in the case of craft jobs.

Charge Number TDA2 0177—Lucinda A. Butler

Responding to each of Ms. Butler's allegations in order, the respondent answers as follows:

1. The respondent's job bidding procedures pursuant to the Union contract which has been submitted, apply

only to plant jobs. Clerical positions are not plant jobs and, therefore, the bid procedure is not available to clerical employees. Clerical employees, however, do have the right to request a transfer to plant jobs. Article XII, Section 1.5.1, of the Union contract requires that job bids and requests for transfers be considered concurrently. Stated simply, although the procedures and terminology are different for plant and clerical employees, the right to move into other jobs is equal.

2. Respondent has investigated this allegation and believes it is without basis in fact.

3. Complainant's third allegation is clearly refuted by the Union contract. Article I, Section 1.1, of the contract makes it clear that all craft employees with the exception of "(a) Secretaries who handle confidential Personnel information and who report directly to Company Officers, Department Heads, Division Managers, Division Superintendents and District Commercial Managers; (b) employees of the Personnel Department; and (c) employees in the General Office Payroll Section," are covered by the contract. The three exceptions which apply only to a small number of employees are necessary because of the sensitive and confidential nature of these jobs.

4. Respondent is unable to determine from this allegation the precise basis of Mrs. Butler's complaint. Responding generally, the Company's overtime pay treatment is governed by Article VII of the Union contract.

5. Males and females are paid equally for the same jobs without regard to sex. All jobs within the Company are open equally to members of either sex.

Charge Number TDA2 1141—Willie King

Mr. King was discharged from the Company's employment on March 22, 1972, because of his persistent failure to report to work on time and his frequent absenteeism.

Mr. King was counseled numerous times concerning the importance of reporting to work at the proper time. Furthermore, he was warned that failure to correct these deficiencies would result in his termination. Mr. King's personnel file (201 file) which was submitted at your request details the foreoging and fully supports the Company's decision to terminate Mr. King.

Charge Number TDA2 0353—Tony Williams

Contrary to Mr. Williams' allegation that he was terminated from his job because of his race, the fact is that Mr. Williams in effect quit his job. On August 2, 1971, Mr. Williams was due back at work from his vacation but failed to report in for work. The following day he reported to work around 8:10 A.M., approximately 40 minutes late. His supervisor at that time, Mr. Small, attempted to discuss with him the subject of his absence the previous day and Mr. Williams responded by becoming mad. Upon Mr. Williams' request he was given his check and he then left work. Later that day Mr. Small contacted Mr. Williams and asked him if he was coming to work. Mr. Williams replied that he was not. Mr. Small then advised him that if he did not report for work the following day he would be released. Mr. Williams did not report the next day and was released.

Charge Number TDA3 0819—Dollie Ray McCarty

This charge will be investigated at another time and has been omitted.

Respondent's position will be submitted at the date of investigation.

Charge Number TDA2 0187—Barbara Collins

Respondent submits that the issue involved in this complaint is moot for the reason that subsequent to the date of the alleged discrimination (failure to award her a shop repairman's job) Ms. Collins was placed in the job of shop repairman.

The respondent's decision to award the shop repairman's job to a male in the first instance was based on the fact that the male had considerable knowledge of electronics and was, therefore, better qualified for the job.

Ms. Collins has alleged that "In addition, the male employee is earning more than I, even though I have more seniority and experience than he does." Respondent cannot determine from this allegation the specific cause of Ms. Collins' complaint. Respondent will respond in full once the meaning of this allegation is made clear.

/s/ Stephen W. Holt
STEPHEN W. HOLT
Senior Attorney

Enc

[SEAL]

GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST
2701 South Johnson Street
P.O. Box 1001
San Angelo, Texas 76901
915 949-9511

December 7, 1973

Mr. Robert A. Ray
Commission Representative
Equal Employment Opportunity Commission
Dallas District Office
400A Lancaster-Kiest Shopping Center, Suite 10
Dallas, Texas 75216

Re: Charge Numbers TDA2-0177, Lucinda A. Butler—TDA2-0187, Barbara Collins—TDA3-0602, Mariano Salome Falcon—TDA3-0819, Dollie Ray McCarty

The following information relating to the captional charges is submitted in addition to the Respondent's original position dated September 10, 1973.

Charge Number TDA2-0177—Lucinda A. Butler

Enclosed is a copy of the time report of Jo Eads, Irving, who was paid call out time the week of May 17, 1973. The applicable have been circled.

Charge Number TDA2-0187—Barbara Collins

Enclosed is a copy of Walter S. Beazel's 201 file.

Charge Number TDA3-0602—Mariano Salome Falcon

Enclosed is a copy of Jerry Eden's 201 file and a list of promotions for Irving. The Linemen-in-Charge in the

Irving Division and the dates they were appointed are as follows:

Danny Fortune—6-4-72

Gary Garrison—3-7-71

James Morrow—8-8-71

Richard Shafer—8-26-73

John Berka—8-15-71

Bernard Shemo—5-13-73

Sal Falcone—10-31-69

We have located two individuals in our Northern Area who have been Linemen-in-Charge for a longer time. They are A. L. Koiner, Denton, who was first appointed 6-12-66. He has been in charge intermittently from that date to the present. Fred Ponder, Sherman, was appointed in charge 1-5-69 and continued in charge until 1-28-73, when he was awarded an Installer Repairman's bid.

Charge Number TDA3-0819—Dollie Ray McCarty

Enclosed is a copy of Yvonne Ward's 201 file.

If we may be of further assistance, please let us know.

/s/ Helen S. Soto
HELEN S. SOTO
Personnel Relations Manager

Enc

[SEAL]

GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST
2701 South Johnson Street
P.O. Box 1001
San Angelo, Texas 76901
915 949-9511

January 8, 1974

Mr. Robert A. Ray
Commission Representative
Equal Employment Opportunity Commission
Dallas District Office
400A Lancaster-Kiest Shopping Center, Suite 10
Dallas, Texas 75216

Subject: Personnel—Discrimination Charges—Charge File Number TDA3-0602—Salome Falcon.
PERS—HSS:cc

As per our telephone conversation of January 4, 1974, enclosed is the additional information you requested.

If you need any additional information, please let me know.

/s/ Helen S. Soto
HELEN S. SOTO
Personnel Relations Manager

Enc

PLAINTIFF'S EXHIBIT NO. 7

CHARGE OF DISCRIMINATION

you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your ea. In most cases, a charge must be filed with the EEOC within specified time after the discriminatory act took place. IT IS HEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS SSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TD63-0652

(PLEASE PRINT OR TYPE) SS# 451-66-2100

Your Name (Mr., Mrs., Miss) Mariana Salcedo Falcon Phone Number 320-0833

Street Address 219 Mount Lockett

City Dallas State Texas Zip Code 75211

WAS THE DISCRIMINATION BECAUSE OF: (Please check one)
Race or Color ☐ Religious Creed ☐ National Origin ☒ Sex ☐ SSA

Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name General Telephone Company of the Southwest

Street address 1400 N. Beltline Rd

City Irving State Texas Zip Code

AND (other parties if any)

6 Have you filed this charge with a state or local government agency? Yes ☐ When (MONTH DAY YEAR) No ☒

8 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month Sept Day 18 Year 1972

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I believe that I have been discriminated because of my national origin — SSA.

I was hired to perform the duties of a Service Representative but was assigned duties which are normally performed by Service Assistants. As a result of this assignment I am not eligible for the Service Representative Training Program. I have been discriminated against as a class — Others.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date Oct 17, 1972 X Mariana Salcedo Falcon (Sign your name)

Subscribed and sworn to before me this 17th day of October 1972

A.E. Lester (Notary) Case Analyst (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

Public Affairs Rep. of EEOC—Hq. 120-0001 FORM EEOC-5 (REV. 1-68)

TDA3-C602

AFFIDAVIT

STATE OF TEXAS)
COUNTY OF Dallas) ss.

I, Mc Kinnon Selvie Faleon, AFTER BEING DULY SWORN, UPON MY OATH DEPOSE AND SAY:

I WAS BORN 10/22/41 (Date). I AM 30 YEARS OF AGE AND LIVE AT 214 Mount Lookout (Number and Street), CITY OF Dallas, COUNTY OF Dallas, STATE OF Texas. 75211 (Zip). MY TELEPHONE NUMBER IS AC 330-0833 AND MY SOCIAL SECURITY NUMBER IS 456-66-2100

I AM ~~EMPLOYED~~ EMPLOYED AT General Telephone Company of the SW CITY OF Irving, STATE OF Texas. (Zip).

WHERE MY TELEPHONE NUMBER IS ~~AC~~ AC 252-6931. I HAVE ~~BEEN~~ BEEN EMPLOYED THERE SINCE July 1969 (Date) AND MY POSITION IS ~~THAT OF~~ THAT OF Lineman In Charge.

I MAKE THE FOLLOWING STATEMENT OF MY OWN FREE WILL:

I was hired by General Telephone in July 1969 as a groundman. A record letter of grade changes, and a record letter lineman in charge, of have accorded with further advancements.

The general progression of jobs from bottom to top is as follows: groundman, lineman, lineman in charge, inspector, crew foreman, and finally construction foreman.

My duties as supervisor, first lineman and later as lineman in charge have been [illegible] He has also been a construction foreman for Gerry Hoffman (Austin) and Hunt in Dallas

part of 1972 and being permitted four grievances to inspect airline safe and with. Two events later he was made a crew foreman and two months later a construction foreman.

Randy Bailey (white) was hired in the latter part of 1971 and was made an inspector four months within a year. He is being instalbe - supervised in Carrollton Texas.

Jerry Edna (white) was hired in April 1972 as a trainee. He had some years experience as a contractor. He was given duties of inspector on September 18 1972.

I believe that I have been discriminated against by my employer personnel policy because I am an EEO Witness who will attest to facts my qualifications and the facts in this affidavit are: (1) Bob Ferguson; (2) John Chamberlain — union steward of carpenters Local #--- Communications Workers of America; (2) Rick Sutcliffe; (4) Stanley Mason; (5) Mike Wolfe; (6) Willie Butler; (7) Pete Butler — all white.

Mr. Ray Calhoun is my area supervisor and Mr Walt Moss is my district Supervisor.

I HAVE READ THE ABOVE STATEMENT, CONSISTING OF 2 PAGES, INCLUDING ANY PARTS OF IT WRITTEN ON THE BACK OF THESE PAGES, AND I SWEAR OR AFFIRM THAT IT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Marvin Dalas Tolison
(Signature)

SUBSCRIBED AND SWORN TO BEFORE ME AT Dallas, TEXAS, THIS 17th DAY OF October, 19 72.

NOTARY PUBLIC (Signature)

_____, Notary Public

FOR _____ COUNTY, TEXAS

MY COMMISSION EXPIRES _____

- or -

J E Little
EQUAL EMPLOYMENT OFFICER
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PLAINTIFF'S EXHIBIT NO. 16

COMPARISON OF MEXICAN-AMERICANS WITH TOTAL WORK FORCE

YEAR	TOTAL EMPLOYEES	MEXICAN-AMERICAN EMPLOYEES	% MEXICAN-AMERICANS	GAIN OR LOSS FROM PREVIOUS YEAR	
				Employees	M.A.'s
12/70	479	8	01.67%		
12/71	542	7	01.29	+63	-1
**12/72	652	8	01.2	+110	+1
12/73	714	13	01.82%	+62	+5
7/74	671	24	03.57%	-43	+11
1/75	618	28	04.53%	-53	+4
***6/75	615	27	04.39%	-3	-1

* GSA Letter written to company on May 12, 1972 setting out areas of underepresentation for Mexican-Americans in the following job catagories:

Officials and Managers (all levels)[1,2]

Professionals[2]

Technicians[1,2]

Office/Clerical (skilled)[1]

Skilled Craft[1,2]

** Plaintiff filed charge with EEOC October 17, 1972

*** Plaintiff filed original complaint April 3, 1975.

1 - The GSA Letter also set out these areas of underepresentation for Black Americans.

2 - The GSA Letter also set out these areas of underepresentation for Females.

SOURCE: Defendant's Answers to Plaintiff's First Set of Interrogatories Nos. 5 and 6.

PLAINTIFF'S EXHIBIT NO. 17

ANALYSIS OF PERSONS HIRED
JULY 1, 1972 to JULY 1, 1976

(1) TOTAL HIRED: 338 ALL DIVISIONS IN NORTH TEXAS AREA

YEAR	TOTAL	WHITE		BLACK		MEXICAN-AMERICAN		OTHER
		MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	
1972	26	7	18	1	0	0	0	0
1973	96	23	54	0	13	2	4	0
1974	73	7	49	0	8	0	7	2
1975	105	40	60	1	2	0	4	0
1976	36	4	32	0	0	0	0	0
TOTAL	338	81	213	2	23	2	15	2
TOTAL %	100.0%	23.7%	63.1%	.5%	6.8%	.5%	4.4%	.5%

(2) TOTAL HIRED: 168 IRVING DIVISION

YEAR	TOTAL	WHITE		BLACK		MEXICAN-AMERICAN		OTHER
		MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	
1972	20	4	15	1	0	0	0	0
1973	69	14	45	0	6	0	4	0
1974	40	3	34	0	0	0	6	2
1975	31	2	25	0	1	0	3	0
1976	8	3	5	0	0	0	0	0
TOTAL	168	25	114	1	13	0	13	2
TOTAL %	100.0%	14.9%	67.8%	00.5%	07.7%	00.0%	07.7%	01.1%

PLAINTIFF'S EXHIBIT NO. 18

ANALYSIS OF MEXICAN-AMERICAN APPLICANTS
JANUARY 1973 to JULY 1976

(1) TOTAL APPLICANTS: 71 45 Females 26 Males

YEAR	MALES	FEMALES	TOTAL
1973	6	4	10
1974	8	8	16
1975	8	19	27
1976	4	14	18
TOTAL	26	45	71

(2)

	FEMALES	MALES	TOTAL
CLERICAL	39	4	43
GENERAL CLERK	2	0	2
COMM. CONSULTANT	0	1	1
LINEMAN	1	12	13
LINEWORKER	2	5	7
LINE PERSON	1	0	1
CABLE SPL. HELPER	0	1	1
MECHANIC	0	3	3
TOTAL	45	26	71

PLAINTIFF'S EXHIBIT NO. 19

ANALYSIS OF BLACK APPLICANTS
JANUARY 1973 to JULY 1976

(1) TOTAL APPLICANTS: 118

YEAR	MALES	FEMALES	TOTAL
1973	7	21	28
1974	5	31	36
1975	13	29	42
1976	4	8	12
TOTAL	29	89	118

(2)

	FEMALES	MALES	TOTAL
CLERICAL	71	7	78
GENERAL CLERK	3	0	3
OFFICE CLERK	3	0	3
COMM. CONSULTANT	1	0	1
LINEMAN	1	2	3
LINEWORKER I	1	14	15
LINE PERSON	0	1	1
CABLE SPL. HELPER	0	2	2
REPAIR CLERK	5	0	5
SERVICE ORDER TYPIST	4	0	4
TRUCK DRIVER	0	3	3
TOTAL	89	29	118

PLAINTIFF'S EXHIBIT NO. 20

ANALYSIS ON UPGRADE ON ALL JOBS
JUNE 1973 to JULY 1976

(1) TOTAL NUMBER OF UPGRADES: ALL DIVISIONS IN NORTH TEXAS AREA, 234

YEAR	TOTAL
1973	92
1974	45
1975	62
1976	35
TOTAL	234

(2) TOTAL NUMBER OF UPGRADES: IRVING DIVISION, 150

WHITE	BLACK	MEXICAN-AMERICAN
13 Males 51 Females	7 Males 7 Females	6 Males 3 Females
TOTAL 150		

(3) PERCENTAGE PER GROUP

WHITE	BLACK	MEXICAN-AMERICAN
87.67%	9.33%	6.00%

(4) MEXICAN-AMERICANS UPGRADED PER YEAR:

1973	3 Males
1974	0
1975	5, 3 Males,* 2 Females
1976	1 Male

*NOTE: Plaintiff is included here as upgraded to Cable Splicer on August 17, 1975.

(5) UPGRADES WITHIN MANAGEMENT: TOTAL 20

WHITE	BLACK	MEXICAN-AMERICAN
18 - 90.00%	2 - 10.00%	0 - 00.00%

UPGRADES FROM FIELD TO MANAGEMENT: TOTAL 9

WHITE	BLACK	MEXICAN-AMERICAN
9 100.00%	0 00.00%	0 00.00%

PLAINTIFF'S EXHIBIT NO. 21

DALLAS FT. WORTH (SMSA)

TOTAL LABOR FORCE

Male	60.7%
Female	39.3%
Black	12.8%
Male	6.7%
Female	6.1%
SSA	5.2%
Male	3.4%
Female	1.8%
Other	0.5%
Male	0.3%
Female	0.2%
Anglo-Cau.	81.5%
Male	50.4%
Female	31.1%

PLAINTIFF'S EXHIBIT NO. 22

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

April 10, 1975

Region 7
819 Taylor Street
Fort Worth, TX 76103

Ms. Helen S. Soto
General Telephone Company
of the Southwest
Post Office Box 1001
San Angelo, Texas 76901

Dear Ms. Soto:

The courtesy and cooperation I received from you, Ms. Norris, and Ms. Bates during my review of the *Irving Division* was sincerely appreciated.

In view of the in-depth study currently taking place throughout your company concerning the identification of an affected class, consideration of this point at the Irving facility will be held in abeyance until the entire study has been completed.

Your record keeping procedures are good and furnish all necessary information needed for our purposes.

Despite the progress made by the Irving Division since the last compliance review, there continue to be areas of under-representation which should be corrected as employment opportunities allow. These areas are as follows:

(1) Females —Officials and managers (all levels)
Professionals
Technicians
Skilled craft
Semi-skilled operatives

(2) Blacks —Officials and managers (all levels)
Technicians
Office/clerical (skilled and entry level)
Skilled craft
Semi-skilled operatives

(3) Spanish-surnamed Americans —Officials and managers (all levels)
Professionals
Technicians
Office/clerical (skilled)
Skilled craft.

(a) Fieldmen—all white
(b) Field draftsmen—all white
(c) Roundmen—all white male
(d) Communications consultants—all white male
(e) Cable splicers—all male
(f) Cable splicer helpers—all male
(g) Installer repairmen—all male
(h) Station installers—all male
(i) Facilitymen—all male
(j) Central office repairmen—all male
(k) PBX repairmen—all male
(l) Combinationmen—all male
(m) Equipment installers—all male
(n) Equipment installer helpers—all male
(o) Linemen—all male
(p) All jobs classed as officials and managers except engineering foremen and I & M foremen —all white
(q) All jobs classed as professionals—all white male
(r) All office and clerical classifications except stockmen and storekeepers—all female

Special attention should be given to these jobs in preparing employment goals for the coming year.

(2) The pre-employment application form contains several items of questionable nature. Unless a bona fide occupational qualification is shown to exist, we will make the following recommendations to your corporate headquarters:

(a) The questions dealing with color of hair, color of eyes, and languages spoken or written (other than English) should be removed from the form.

(b) The question regarding arrest information should either be removed from the form or changed to request conviction information only.

(c) The second sentence of question No. 1 under employment agreements which reads, "I request any duly constituted law enforcement agency or judicial officer to furnish the company with all information it may have pertaining to me . . .," should be changed to read, "I request any duly constituted law enforcement agency or judicial officer to furnish the company with *conviction information* it may have pertaining to me. . . . ."

Evidence of corrective measures taken to eliminate the deficiencies noted herein should be forwarded to this office by June 16, 1972.

If we can be of any assistance, please call us at (817) 334-3538.

Sincerely,

/s/ Janis H. Harbert
JANIS H. HARBERT
Assistant Contract Compliance Officer

PLAINTIFF'S EXHIBIT NO. 23

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

Region 7
May 12, 1972 819 Taylor Street
Fort Worth, Texas 76102

Mr. Robert W. Doan, Division Manager
General Telephone Company of the Southwest
3500 North Beltline Road
Irving, Texas 75062

Dear Mr. Doan:

Thank you very much for the cooperation of you and your staff during the recent compliance review of your facilities' equal employment opportunity programs.

After reviewing both the equal employment opportunity policies and practices of your facilities, it was noted that there are several areas where additional emphasis is required to improve the implementation of your affirmative action plan. These areas are as follow:

(1) We understand that Lewisville, being the headquarters for the Northern area, has the responsibility for hiring and firing practices; however, when the time arrives for evaluation of the company's employment force, you are contacted to give your goals for the coming year. To formulate these goals you must be aware of the areas in your facility in which minorities and women appear to be under-represented. After evaluating the employee listing, we determined that minorities appear to be under-represented in the job categories of officials and managers, professionals, technical workers, sales workers, office and clerical workers, craftsmen, and operatives. Women also

appear to be under-represented in all job categories noted above except office and clerical workers.

Although your personnel responsibilities limit you primarily to promotions, this is an excellent vehicle for alleviating much of the under-representation of minorities and of women. So that such employees will be well qualified for promotions when they are considered, they should be encouraged to participate in appropriate training for skills needed for upgraded positions.

Further investigation of the employee listing revealed the following jobs as areas apparently segregated as to race and/or sex:

While I realize that the goals set for 1975 are based solely on turn-over replacement hiring because of the current force reduction, I recommend that the Irving Division utilize all available opportunities to increase the representation of females in the skilled craft and semi-skilled operatives job classifications. At the time of the review, minority representation in these two areas was considerably better than the female representation.

Any response to the comments made in this letter should be forwarded to this office not later than May 15, 1975. Please call if you have any questions, or if I can be of assistance.

Sincerely,

/s/ Jackie M. Bozanich
JACKIE M. BOZANICH
Compliance Officer

cc: Ms. Beverly Norris
General Telephone Co.
of the Southwest

PLAINTIFF'S EXHIBIT NO. 25
(1974 collective bargaining agreement)
(Excerpts)

AGREEMENT

This Agreement is made as of June 16, 1974, by and between the General Telephone Company of the Southwest, hereinafter referred to as the "Company" or "Management" and the Communications Workers of America, hereinafter referred to as the "Union", and the employees of the Company in the Bargaining Unit.

Both parties reaffirm their intention that the provisions of this agreement will continue to be applied without discrimination because of race, color, age, religion, national origin, or sex of the employee.

ARTICLE I

UNION RECOGNITION

Section 1. Designation of Bargaining Unit

1.1 The Company recognizes the Union as the exclusive collective bargaining agency for all non-supervisory, non-professional, and non-administrative employees within the Company with the exception of: (a) Secretaries who handle confidential Personnel information and who report directly to Company Officers, Department Heads, Area General Managers, Area Operations Managers, Division Managers, Division Department Managers and District Managers; (b) employees of the Personnel Department; and (c) employees in the General Office Payroll Section.

Section 2. Recognition

2.1 The Company agrees in the manner hereinafter described to meet and bargain with the representatives of the Union with respect to grievences, wages, hours of employment, and working conditions.

ARTICLE II

DEFINITIONS

1. Basic Wage Rate, Basic Rate—The hourly rate of pay determined by the wage schedule for the job; it excludes differentials, premiums, and other extra payments.

• • • •

Number of Hours Normally Worked per Week	Amount of Credit per Month
1-8 hrs. inclusive	1/5 month
9-16 hrs.	2/5 month
17-24 hrs.	3/5 month
25-32 hrs.	4/5 month
33 and over	1 month

Section 3. Bridging of Net Credited Service

3.1 At the employee's request, net credited service with respect to former employees of the Company will include recognition of all prior periods of active employment after the employee has completed five (5) continuous years of active employment following the employee's reemployment, except that periods of prior active employment of less than six (6) months' duration will not be recognized. Such recognition will include active employment with any of the predecessors and/or affiliates of the Company. Net credited service will be computed to the nearest half month.

3.2 Active employment with non-agency operated exchanges (less than a complete company) purchased will be recognized by the Company with respect to each employee.

ARTICLE XVI

SENIORITY

Section 1. Computation of Seniority

1.1 Seniority shall be computed in the same manner as net credited service, except that the resultant shall

not be altered by adjustment to the first of a calendar month.

1.2 In cases of service bridging, those portions of seniority and net credited service which pertain to prior service shall be identical.

Section 2. Application of Seniority

2.1 Seniority shall be the deciding factor, insofar as the ability of the employee and the conditions of the business will permit, in matters affecting assignment of hours and vacations, voluntary and involuntary transfer, promotions, layoffs, and rehiring after layoffs.

2.1.1 In the application of seniority there may arise some occasions when a confliction develops by reason of two (2) or more employees possessing equal seniority. In such cases, applicable seniority will be determined by the order of dates of birth of each employee concerned.

2.2 Whenever any provisions contained within this Agreement makes specific reference to application of seniority for a given circumstance the application prescribed within that provision will prevail.

2.3 One employee may displace another through application of seniority only under the following circumstances:

2.3.1 Force adjustment

2.3.2 Return from a leave of absence that is actual or implied, wherein reinstatement to the original job is a condition of the leave.

2.3.3 Return from military service under re-employment rights established by law.

2.4 Nothing within this Agreement shall be construed to mean that, during application of force adjustment procedures, seniority may be applied in such manner that an employee may achieve a job assignment that is of a higher wage level than the job which the employee is vacating by reason of force adjustment.

Section 3. Transfers or Promotions

3.1 Employees transferred or promoted from the bargaining unit shall continue to accrue seniority.

Section 4. Training Opportunities

4.1 The Company agrees that opportunities for job training which would serve to equip employees for promotion to higher paid occupations within the bargaining unit will not be employed in such manner as to circumvent the seniority principles as set forth within this Article XVI.

4.1.1 Job training herein means formal training and, as well, informal training by experience gained in temporary assignments to higher paid occupations within the bargaining unit.

PLAINTIFF'S EXHIBIT NO. 30

(General Telephone's Affirmative Action Plan) (Excerpts)

AFFIRMATIVE ACTION PROGRAM
OPERATION ATTAINMENT

[SEAL]

GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST
P.O. Box 1001
San Angelo, Texas 76901

August 2, 1968

General Telephone Company of the Southwest has long recognized its responsibility, not only to customers, stockholders and employees, but also to the communities in which we operate. This is in evidence through the years by our very active participation in any number of community projects. We realize that we have a responsibility as a corporate entity to our communities. This program, is another step that we, as General Telephone Company of the Southwest, are taking in an effort to improve our communities.

This program has been designed to provide underprivileged persons who have, in the past, had limited possibilities of self-development and advancement and opportunity to attain these goals. This program has the complete backing of your top management since we feel this is a means whereby we, as a Company, can exercise our social responsibility and improve our communities as well as give these individuals a chance to develop, and at the same time help the Company grow and prosper.

This program, as with any program we might undertake, can succeed only to the degree that our employees desire for it to succeed. This program will require com-

plete cooperation and understanding from all concerned. Each of us must accept this as a challenge whereby we have an opportunity to do something for those less fortunate than ourselves. Full cooperation is a must and will be expected from all those participating in this program; as supervisors, as coworkers, or as participants.

In order for our company to maintain its role in the communities we serve, this program must be successful. It means that the company has opened another avenue for obtaining good employees. It also means that persons who before had little opportunity and even less future now have a chance to become worthwhile members of our society through their own self-development.

/s/ L. Gray Beck
L. GRAY BECK
President

INTRODUCTION

Statement of Intent

The Company recognizes that certain groups of underprivileged persons have limited possibilities of self-development and advancement without specific opportunity.

This program is created to provide opportunity for those whose opportunities have, in the past, been limited. This program is undertaken, not as a charity gesture, but rather as a means whereby we, as a Company, can exercise our social responsibility and improve our communities as well as provide individuals with a change for development.

This "Operation Attainment" is a special program designed to employ persons unable to meet the Company's normal hiring standards; and persons so employed will be given necessary training and consideration for the duration of this program which is for a one-year period.

Role of the Supervisor

Since this program involves the hiring of people who have less than high school education and who do not make minimum scores on tests, it is to be expected that their progress will be somewhat slower than regular employees. Also, their background may be such that they have not had the opportunity to work on a continuing basis under established working rules and practices.

The success of this program rests mainly on the immediate supervisor of participants. Since these participants' backgrounds may be somewhat different from the normal applicant and employee, the supervisor must exercise a great deal of understanding and patience in helping develop these employees into the type of individuals required by the Company.

EMPLOYMENT

Recruitment

Since this program involves the recruiting of the disadvantaged, recruiting practices must be somewhat different from the norm because these individuals do not have a high school education and cannot normally pass the entrance tests given by many companies. They may have become somewhat cynical toward any employment opportunities. We must recognize that this attitude has been established through their actual experiences and that a mere advertisement may not induce these individuals to apply.

In cases such as this, the best contact is through community leaders. Since we have established contact with community leaders already, it will be necessary now to explain this program to them, showing them that there is opportunity for these individuals with our company and they, in turn, can advertise this program and provide us with a number of applicants. In addition to this approach, the normal recruiting procedures should be used with emphasis being placed on the type program being instituted.

Selection

It is anticipated that a larger number of potential employees will be recruited above the number of vacancies the company has available. Selection procedure will be very similar to our normal hiring procedures. However, there will be some deviations.

Placement

The first selection tool is, or course, the application. From the application the interviewer can determine if the applicant would be eligible for employment. Things which might exclude employment would be such things as a poor medical history, an undesirable police record (and

in this case we must separate arrest and conviction and then determine what the conviction was and if this should preclude employment). After the applicant has completed the application and it has been reviewed, an initial interview can be conducted. After this interview, the supervisor who will supervise the applicant if hired will interview the applicant, and the two interviewers will compare results and determine if the applicant is suitable for hire. The next step will be to administer the usual preemployment test battery.

However, test results will not be used as criteria to either hire or not hire the applicant, the only exception being that if test results show the applicant to have below minimum aptitude for the areas that we have job openings. The following tests will be used: Employee Aptitude Survey—Test 1—Verbal Comprehension—Test 2—Numerical Ability—Test 3—Visual Pursuit—Test 9—Manual Speed and Accuracy, —An inventory of Factors STDCR—Occupational Interest Inventory Advanced, in addition male applicants receive Employee Aptitude Survey Test 5, Space Visualization. Retesting and evaluation of test will be made at a later time. Placement of these individuals will be based upon the aptitudes of the applicant plus the needs of the business. It is anticipated that all Plant hirees will initially hold the position of groundman.

SUPPLEMENT TO AFFIRMATIVE ACTION PROGRAM FOR GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

In order to meet the challenges and opportunities brought about by changing social attitudes and customs, our company is revising, with this supplement, its equal employment policy.

This supplement to our Affirmative Action Program sets out additional guidelines to be followed in reaching our objective to increase employment opportunities for minorities and females working in our communities. Through the full implementation of these guidelines, we will not only meet the needs and employment requirements of people in the communities which we serve, but will enhance the company's position in its relationship with our customers; local, state and federal political officials, and regulatory bodies.

These guidelines were established January, 1972, and are being implemented on a uniform basis throughout the company. They are as follows:

Ultimate Goal

The ultimate goal of the company is a percent minority and female employment consistent with the percent minority and female population within the combined communities comprising the Company's labor market. (See Exhibit I & II)

Female-Management

The objective of the Company with respect to the distribution of its female employees within the combined top four EEO categories is a 1.5% increase to the present percent participation. (See Exhibit III for percentage increase for General Office and areas.)

Minority-Management

The objective of the Company with respect to the distribution of its minority employees within the management structure is a 2% increase to the present percent participation. (See Exhibit III for percentage increase for General Office and areas.)

Timetable for Implementation

The timetable for attaining the ultimate goal is 1979 and the other two objectives, December 31, 1972.

Statement of Commitment

It is hereby reaffirmed that the opportunities afforded throughout General Telephone Company of the Southwest for employment, for advancement, and for work in dignity are available equally to all. An employee or prospective employee is evaluated on the basis of performance and attitude, skill and experience, ambition, energy, and aptitude—and not race, color, sex, age, religion, or national origin.

/s/ Owen N. Rabourn
OWEN N. RABOURN
Vice President—Personnel

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

AREA	POPULATION	WHITE NUMBER	%	NEGRO NUMBER	%	MEXICAN-AMERICAN NUMBER	%	INDIAN NUMBER	%	OTHER NUMBER	%
Central	683,581	545,237	79.5	76,315	11.2	59,575	8.7	996	0.1	3,558	0.5
Eastern	1,120,059	850,708	76.0	263,753	23.5	3,849	0.3	0	0.0	2,749	0.2
Northern	3,110,213	2,593,032	83.3	394,263	12.7	77,168	2.5	28,536	0.9	18,215	0.6
Southern	4,182,558	2,625,541	62.8	534,347	12.7	969,113	23.2	0	0.0	33,347	0.8
Western	593,728	495,640	83.5	30,119	5.1	63,392	10.7	288	0.1/	4,349	0.7
TOTALS	9,656,754	7,081,457	73.3	1,311,134	13.6	1,172,097	12.1	29,820	0.3	62,357	0.6

AREA	POPULATION	MINORITY POPULATION	PERCENT MINORITY
Central	683,581	140,44	20.5
Eastern	1,120,059	269,351	24.0
Northern	3,110,213	516,183	16.7
Southern	4,182,558	1,557,007	37.2
Western	593,728	98,088	16.5
TOTALS	9,656,754	2,575,348	26.7

AFFIRMATIVE ACTION PROGRAM

A program of employment and training of minority groups

INTRODUCTION

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST INTRACOMPANY CORRESPONDENCE

To All Supervisory Personnel

Because of the vital importance of our Company's basic policy of providing equal employment opportunities, I believe it is essential that this policy be reiterated periodically.

As pointed out by Leslie H. Warner, President of General Telephone & Electronics Corporation, in behalf of the entire General System:

> *"The opportunities afforded throughout the General System for employment, for advancement, and for work in dignity are available equally to all. An employee or prospective employee is evaluated on the basis of performance and attitude, skill and experience, ambition, energy, and aptitude—and not race, color, sex, age, religion, or national origin".*

This policy is reflected in many aspects of our day-to-day operations, as follows:

Each company in the General System identifies itself as an Equal Opportunity Employer in advertising for employees, in recruiting brochures, in company newspapers and employee manuals, and in all day-to-day practices.

Each applicant who seeks employment with a General System company is given a fair and unbiased evaluation of his or her capabilities.

Company facilities for the convenience of employees are available to ALL employees. Every employee has full access to all company-sponsored programs, such as educational assistance, training, recreational programs, and social activities.

Jobs requiring equivalent skill, training, and responsibility are ranked within the pay structure without discrimination. Promotions and advancement, as well as training opportunities which prepare an employee for advancement, are based on the employee's actual performance, and not race, color, sex, age, religion, or national origin.

In short, all functions of General Telephone Company of the Southwest and the entire General System reflect the spirit of our role as an Equal Opportunity Employer. I trust that all of you join me in conscientiously following this vitally important policy.

Sincerely yours,

/s/ L. Gray Beck
L. GRAY BECK
President

Affirmative Action Program

A program of employment and training of minority groups

AFFIRMATIVE ACTION PROGRAM FOR NORTHERN AREA OF GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

This establishment is an Equal Employment Opportunity Employer. As an Area of General Telephone Company of the Southwest, a subsidiary of General Telephone & Electronics Corporation, it is a participating facility in the Plans for Progress Program. In keeping with the Company's policy against discrimination and with the principles of the aforesaid undertakings, this Area is dedicated to provide equal employment opportunity without regard to race, color, sex, religion, or national origin. In order to implement our efforts to increase employment opportunities for minorities and for women living in the Northern Area, the following affirmative action program has been adopted.

/s/ D. A. Dunaway
Area Manager

I. Dissemination of Nondiscrimination Policies and Affirmative Action Programs

A. Periodically throughout the year the Company will reemphasize to all its employees its policy of nondiscrimination in employment. This will be done through staff meetings at the Area, Division, or District level, through articles in the Company newspaper, and in supervisor-employee discussions. (Exhibit A).

B. The Area will from time to time update and present its orientation programs to supervisory employees to better enable them to implement Company policies against discrimination and to familiarize them with the problems and solutions essential to more effective employment of minorities and women. This program is adopted in recognition of the importance of the supervisor's day-to-day role in creating an atmosphere of equal employment opportunity.

C. Periodically throughout the year the Company will meet with Union officials to inform them of Company's policy against discrimination in employment and request their cooperation. Time phased goal—90 days.

D. EEO Posters will be displayed on bulletin boards and, where applicable, the EEO nondiscrimination clause in all nonexempt purchase orders, contracts, leases, and/or subcontracts will be incorporated.

E. Company facilities, including work areas, cafeterias and recreation areas, will be maintained on a nonsegregated basis.

F. Each Division or District Manager and the Area Personnel Administrator shall advise in writing all employment sources at least once each year of their policy against discrimination in employment.

G. Each Division or District Manager and the Area Personnel Administrator periodically will reemphasize to their various employment sources, as well as organizations representing minorities and women, the Area's policy against discrimination. These sources and organizations shall be updated annually and now include, but shall not be limited to, the following:

1. Urban League
2. Urban Coalition
3. NAACP
4. National Alliance of Businessmen (NAB)

5. Congress of Racial Equality (CORE)

6. United Negro College Fund

Time phased goal—120 days.

H. In order to better acquaint minority and women's groups with employment opportunities in the Area Office and in each Division or District, from time to time our representatives will meet with organizations representing such groups. These meetings will be programmed to establish and maintain lines of communications with these groups with regard to employment opportunity in this Area. At least once each year, tours of our offices will be made available to these groups in order to apprise them of the types of job opportunities in this Area. Currently, the following groups are included:

1. Community Action Councils (CAC)

2. NAACP

3. LULAC

4. American GI Forum

Time phased goal—120 days.

I. The Area Office and each Division or District will participate in and/or initiate the conduct of high school career days in schools, including girls' schools and those wherein deprived and minority groups are significant percentage of the enrollment. These meetings will describe this establishment's operations and the types of jobs which the high school graduate can anticipate filling or training to fill in the future. Annually, a list of such schools will be prepared by the Area Personnel Administrator.

J. The Company's General Office and the Area Personnel Administrator will correspond with predominately Negro colleges, women's colleges, and those colleges with a high percentage of Mexican-Americans, to apprise them of the types of jobs generally available in the Company

and of our policy of equal employment opportunity. Currently, the following schools are included in this Area:

1. Bishop College—Dallas, Texas
2. Texas Women's University—Denton, Texas
3. Langston College—Langston, Oklahoma

II. Recruitment of New Employees

A. In addition to notifying the Company's regular employment sources of impending job openings, this Area will also advise minority oriented organizations and women's organizations of said openings and encourage submission of applications for such jobs.

B. Included in the employment sources from high school and colleges will be the following high schools and/or colleges for women or wherein the enrollment is primarily minority oriented:

1. Texas Women's University
2. Bishop College
3. Langston College
4. Note: High Schools in Northern Area are all integrated and are all contacted regularly for minority employment possibilities.

C. In all of the solicitations and advertisements relating to job openings in this Area, there will be an appropriate legend clearly indicating that all qualified applicants will receive consideration for employment without regard to race, color, sex, religion, or national origin.

D. An active list of all jobs in the Area shall be maintained which shall contain job titles and principle duties. Statistics will be prepared annually on minority member and female employment in each of these jobs.

Time phased goal—90 days.

E. Periodically an analysis and reanalysis will be made of the jobs in the Area which might be filled by available members of the minority community and by women, based on existing skills possessed by said individuals and on skills that can be acquired in training programs available in the community.

Time phased goal—90 days.

F. Periodically there will be a review of job categories wherein few or no minority group persons or women are presently employed and a survey to determine the cause of this situation. Included within said review, will be particular emphasis on jobs deemed available or unavailable to minority groups and women in the area, the reasons for rejections of applicants when applications have been made, the reasons for lack of applications and the testing procedures, if any, used for the jobs. As a further part of said review, an attempt will be made to determine what jobs, if any, could reasonably be filled by minority group personnel and by women. Where the analysis shows a need for remedial action, appropriate action will be implemented. Special attention will be given to skilled, administrative and clerical jobs.

Time phased goal—90 days.

III. Job Opportunities for Promotion for Women and Members of Minority Groups on the Payroll

A. Each year an analysis of upgrading, transfer or promotion by women and minority members in the past year will be made to determine the progress of women and minorities on the payroll. Special effort will be given to determine which women and minority members show capability for upgrading to skilled and supervisory positions, either with or without additional training. In those instances wherein women and minority members were potentially qualified for job openings in the past year, but were then rejected for said openings, reasons therefore will be reviewed. In instances wherein indi-

viduals are potentially qualified, but additional training is needed, efforts will be made to suppy said training or to recommend study courses so as to qualify such individuals for advancement.

B. At least once annually at the time of their Periodic Review of Employee Performance, minority member employees will be given a special counseling and reorientation to advise them of their potential for advancement in the Company in the future.

C. This establishment has adopted a COEMPLOYEE SYSTEM wherein new employees will be assigned to another employee to orient him in his job and work environment.

IV. Community Action Program

In addition to direct employment activity relating to women and minority groups, this Area is a participant in the following community activities which seek to aid and improve job opportunities, including training, hiring and upgrading, for women and minority employees:

1. Urban Coalition Program
2. National Alliance of Businessmen
3. NAACP
4. LULAC
5. Urban League

V. Compliance Administration

A. The Area Manager will issue the proposed Affirmative Action program as the official Northern Area's EEO compliance program of General Telephone Company of the Southwest, and will charge each division and district with its performance within the framework of this program, and for necessary procedures to make the program effective.

B. The Area Personnel Administrator is designated as the Area's compliance officer and will coordinate and monitor the Area's program. The Area Personnel Administrator will also review progress with the Personnel Relations Representative and Area Manager, and will assist divisions and districts in the identificaton of problem areas and establishment of local and unit goals and objectives.

VI. Training Programs

The Company has established, or participates with the community in, the following training programs which seek to better enable women and minority employees to qualify for available jobs and for jobs which will become available in the future.

1. Operation Attainment
2. Distributive Education

VII. Miscellaneous

A copy of the Company's "Operation Attainment" program is included in Exhibit B. Operation Attainment is a program of employment and advancement of the disadvantaged without regard to race, color, sex, religion, or national origin.

This program is created to provide opportunity for those whose opportunities have, in the past, been limited. This program is undertaken, not as a charity gesture, but rather as a means whereby we, as a Company, can exercise our social responsibility and improve our communities as well as provide individuals with a chance for development.

This "Operation Attainment" is a special program designed to employ persons unable to meet the Company's normal hiring standards; and persons so employed will be given necessary training and consideration for the duration of this program which is for a two-year period.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

STRIBUTION OF POPULATION BY RACE IN THE NORTHERN AREA[a]

WHITE		NEGRO		MEXICAN-AMERICAN[aa]		OTHER	
NBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
59,781	89.3	4,825	7.2	1,807	2.7	507	0.8
051,006	79.2	220,616	16.6	45,129	3.4	10,570	0.8
68,125	90.1	5,468	7.2	1,437	1.9	603	0.8
20,054	88.3	2,305	10.2	250	1.1	96	0.4
74,610	89.7	6,863	8.2	1,415	1.7	335	0.4
18,675	82.6	2,948	13.0	813	3.6	160	0.7
23,408	75.1	7,089	22.8	530	1.7	123	0.4
95,351	84.5	81,040	11.3	25,787	3.6	4,139	0.6

WHITE		NEGRO		INDIAN		OTHER	
BER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
3,369	93.9	994	4.0	492	2.0	19	0.1
5,948	94.2	855	1.8	1,865	3.8	123	0.3
8,083	92.8	1,079	5.5	292	1.5	28	0.1
3,663	96.3	254	1.8	226	1.6	14	0.1/
9,600	77.0	1,308	10.5	1,550	12.6	14	0.1
6,340	78.2	9,698	16.6	3,022	5.1	82	0.1
7,571	70.9	1,829	17.1	1,278	12.1	5	0.0
6,268	88.3	872	3.0	2,565	8.6	45	0.2

NORTHERN AREA - PAGE 2

OKLAHOMA COUNTIES	POPULATION	WHITE NUMBER	WHITE PERCENT	NEGRO NUMBER	NEGRO PERCENT	INDIAN NUMBER	INDIAN PERCENT	OTHER NUMBER	OTHER PERCENT
POTTAWATOMIE	43,134	39,625	91.9	1,377	3.2	2,018	4.7	114	0.3
TULSA	401,663	353,628	88.0	36,044	9.0	11,041	2.7	950	0.2
WAGONER	22,163	19,317	87.2	2,003	9.0	799	3.6	44	0.2
WASHINGTON	42,277	39,734	94.0	1,131	2.7	1,241	2.9	171	0.4
TOTALS	3,110,213	2,592,032	83.3	394,263	12.7	28,536	0.9	18,215	0.6

	NUMBER	PERCENT
MEXICAN-AMERICAN	77,168	2.5

/Less than 0.1 percent
@ U.S. Bureau of the Census. U.S. Census of Population: 1970
Distribution of Population by Race in Oklahoma data from 1970 census: Oklahoma Employment Commission

@@ Figures for Mexican-Americans computed from 1960 percentages

	NUMBER	PERCENT
TOTAL MINORITY	518,182	16.7

AFFIRMATIVE ACTION PROGRAM – GOALS AND TIMETABLES

Area: Total Company Location: Date Prepared: January, 1972 Category: Combined

JOB TITLE	MINORITY GROUPS		BASE 1972	GOAL 1973	BASE 1973	GOAL 1973	BASE 1974	GOAL 1974
Office and Clerical Craftsman–Skilled Operatives–Semi Skilled Laborers–Unskilled Service Workers	Non-Minority	Male	3,274					
		Female	2,760					
		TOTALS	6,034					
	Negroes	Male	178					
		Female	288					
		TOTALS	466					
Officials and Managers Professionals Technicians Sales Workers	Oriental	Male	3					
		Female	-					
		TOTALS	3					
	Spanish Surnamed Americans	Male	176					
		Female	183					
		TOTALS	359					
	American Indians	Male	48					
		Female	60					
		TOTALS	108					
	Total Minority	Male	405					
		Female	531					
		TOTALS	936 (13.4)	1,227 (16%)				
	TOTALS	Male	3,679					
		Female	3,291					
		TOTALS	6,970	7,673				

Percent Minority Population 13.7 Percent Female Population 46.4

AFFIRMATIVE ACTION PROGRAM – GOALS AND TIMETABLES

Area: Total Company Location: _____ Date prepared: January, 1972 Category: Management

JOB TITLE	MINORITY GROUPS		BASE 1972	GOAL 1972	BASE 1973	GOAL 1973	BASE 1974	GOAL 1974
Officials and Managers Professionals Technicians Sales Workers	Non-Minority	Male	971					
		Female	216					
		TOTALS	1,187					
	Negroes	Male	11					
		Female	2					
		TOTALS	13					
	Oriental	Male	1					
		Female	-					
		TOTALS	1					
	Spanish Surnamed Americans	Male	25					
		Female	4					
		TOTALS	29					
	American Indians	Male	16					
		Female	5					
		TOTALS	21					
	Total Minority	Male	53					
		Female	11					
		TOTALS	64(5.1)	96(7.1)				
	TOTALS	Male	1,024					
		Female	227(18.0)	263(19.5)				
		TOTALS	1,251	1,348				

AFFIRMATIVE ACTION PROGRAM – GOALS AND TIMETABLES

Area: Total Company Location: _____ Date Prepared: January, 1972

Category: Craft

JOB CODE	[illegible]		BASE 1972	GOAL 1972	BASE 1973	GOAL 1973	BASE 1974	GOAL 1974
Office and Clerical Craftsman–Skilled Operatives–Semi-Skilled Laborers–Unskilled Service Workers	Non-Minority	Male	2,306					
		Female	2,545					
		TOTALS	4,851					
	Negroes	Male	167					
		Female	286					
		TOTALS	453					
	Orientals	Male	2					
		Female	-					
		TOTALS	2					
	Spanish Surnamed Americans	Male	151					
		Female	178					
		TOTALS	329					
	American Indians	Male	29					
		Female	55					
		TOTALS	84					
	Total Minority	Male	349					
		Female	519					
		TOTALS	868(15.2)	1,131(17.9)				
	TOTALS	Male	2,655					
		Female	3,064					
		TOTALS	5,719	6,325				

AFFIRMATIVE ACTION PROGRAM – GOALS AND TIMETABLES

Date Prepared January, 1972

Area General Office Location _____ Category Combined

JOB TITLE	MINORITY GROUPS		BASE 1972	GOAL 1972	BASE 1973	GOAL 1973	BASE 1974	GOAL 1974
Office and Clerical	Non-Minority	Male	326					
Craftsmen–Skilled		Female	393					
Operatives–Semi-Skilled		TOTALS	719					
Laborers–Unskilled	Negro	Male	26					
Service Workers		Female	17					
		TOTALS	43					
Officials and Managers	Oriental	Male	1					
Professionals		Female	–					
Technicians		TOTALS	1					
Sales Workers	Spanish Surnamed Americans	Male	27					
		Female	54					
		TOTALS	81					
	American Indians	Male	7					
		Female	7					
		TOTALS	14					
	Total Minority	Male	61					
		Female	78					
		TOTALS	139(16.2)	149(16.0)				
	TOTALS	Male	387					
		Female	471					
		TOTALS	858	929				

Percent Minority Population 25.7 Percent Female Population 26.4

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AFFIRMATIVE ACTION PROGRAM – GOALS AND TIMETABLES

Area General Office Location _____ Date prepared January, 1972 Category Management

JOB TITLE	MINORITY GROUPS		BASE 1972	GOAL 1972	BASE 1973	GOAL 1973	BASE 1974	GOAL 1974
Officials and Managers Professionals Technicians Sales Workers	Non-Minority	Male	281					
		Female	74					
		TOTALS	355					
	Negroes	Male	5					
		Female	-					
		TOTALS	5					
	Oriental	Male	1					
		Female	-					
		TOTALS	1					
	Spanish Surnamed Americans	Male	9					
		Female	2					
		TOTALS	11					
	American Indians	Male	6					
		Female	2					
		TOTALS	8					
	Total Minority	Male	21					
		Female	4					
		TOTALS	25(6.6)	27(6.3)				
	TOTALS	Male	302					
		Female	78(20.5)	86(19.9)				
		TOTALS	380	433				

AFFIRMATIVE ACTION PROGRAM – GOALS AND TIMETABLES

Area General Office Location _____ Date Prepared January, 1972 Category Craft

JOB CODE	MINORITY GROUPS		BASE 1972	GOAL 1972	BASE 1973	GOAL 1973	BASE 1974	GOAL 1974
Office and Clerical Craftsman–Skilled Operatives–Semi-Skilled Laborers–Unskilled Service Workers	Non-Minority	Male	45					
		Female	319					
		TOTALS	364					
	Negroes	Male	21					
		Female	17					
		TOTALS	38					
	Orientals	Male	1					
		Female	-					
		TOTALS	1					
	Spanish Surnamed Americans	Male	18					
		Female	52					
		TOTALS	70					
	American Indians	Male	1					
		Female	5					
		TOTALS	6					
	Total Minority	Male	40					
		Female	74					
		TOTALS	114(23.0)	122(24.6)				
	TOTALS	Male	85					
		Female	393					
		TOTALS	478	496				

AFFIRMATIVE ACTION PROGRAM -- GOALS AND TIMETABLES

Area: Northern Location: _____ Date Prepared: January, 1972 Category: Combined

JOB TITLE	MINORITY GROUPS		BASE 1972	GOAL 1972	BASE 1973	GOAL 1973	BASE 1974	GOAL 1974
Office and Clerical Craftsman--Skilled Operatives--Semi Skilled Laborers--Unskilled Service Workers	Non-Minority	Male	974					
		Female	549					
		TOTALS	1,523					
	Negroes	Male	38					
		Female	30					
		TOTALS	68					
Officials and Managers Professionals Technicians Sales Workers	Oriental	Male	-					
		Female	-					
		TOTALS	-					
	Spanish Surnamed Americans	Male	18					
		Female	7					
		TOTALS	25					
	American Indians	Male	12					
		Female	12					
		TOTALS	24					
	Total Minority	Male	68					
		Female	49					
		TOTALS	117(7.1)	217(11.0)				
	TOTALS	Male	1,042					
		Female	598					
		TOTALS	1,640	1,971				

Percent Minority Population: 16.7 Percent Female Population: 30.9

AFFIRMATIVE ACTION PROGRAM – GOALS AND TIMETABLES

Date prepared January, 1972

Area Northern Location _____ Category Management

JOB TITLE	MINORITY GROUPS		BASE 1972	GOAL 1972	BASE 1973	GOAL 1973	BASE 1974	GOAL 1974
Officials and Managers Professionals Technicians Sales Workers	Non-Minority	Male	237					
		Female	37					
		TOTALS	274					
	Negroes	Male	1					
		Female	–					
		TOTALS	1					
	Oriental	Male	–					
		Female	–					
		TOTALS	–					
	Spanish Surnamed Americans	Male	3					
		Female	–					
		TOTALS	3					
	American Indians	Male	1					
		Female	–					
		TOTALS	1					
	Total Minority	Male	5					
		Female	–					
		TOTALS	5(1.8)	12(4.2)				
	TOTALS	Male	242					
		Female	37(13.3)	47(16.4)				
		TOTALS	279	297				

AFFIRMATIVE ACTION PROGRAM – GOALS AND TIMETABLES

Area: Northern Location: _____ Date Prepared: January, 1972 Category: Craft

JOB CODE	MINORITY GROUPS		BASE 1972	GOAL 1972	BASE 1973	GOAL 1973	BASE 1974	GOAL 1974
Office and Clerical Craftsmen–Skilled Operatives–Semi-Skilled Laborers–Unskilled Service Workers	Non-Minority	Male	737					
		Female	512					
		TOTALS	1,249					
	Negroes	Male	37					
		Female	30					
		TOTALS	67					
	Orientals	Male	-					
		Female	-					
		TOTALS	-					
	Spanish Surnamed Americans	Male	15					
		Female	7					
		TOTALS	22					
	American Indians	Male	11					
		Female	12					
		TOTALS	23					
	Total Minority	Male	63					
		Female	49					
		TOTALS	112(8.2)	205(12.2)				
	TOTALS	Male	800					
		Female	561					
		TOTALS	1,361	1,684				

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Plaintiff MARIANO S. FALCON, and submits this his Findings of Fact and Conclusions of Law:

PROPOSED FINDINGS OF FACT FOR THE INDIVIDUAL CLAIM OF MARIANO FALCON

1. Plaintiff, a Mexican-American, was hired by Defendant on July 7, 1969, pursuant to a program devised to employ hard core unemployed minorities. Plaintiff was one of two members in the class who finished the course and began working for the Defendant. Plaintiff finished only 6 grades of formal schooling, worked as a migrant worker, attended part of the 7th grade and then worked in the South Texas valley. At the time Plaintiff was working for Defendant he had trained himself and worked as a welder for several years and he worked as a welder in Dallas, Texas, for a short period of time prior to starting the Defendant's company class. Plaintiff was not trained in the communications area prior to his schooling with the Defendant.

2. Defendant is a public utilities company and provides telephone service in a four state area, including the State of Texas, the State of New Mexico, the State of Oklahoma, and the State of Arkansas. The Defendant is a wholly owned subsidiary of General Telephone and Electronics which owns and controls telephone subsidiaries in California, Florida, Hawaii, Illinois, Indiana, Kentucky, Michigan, Ohio, Pennsylvania, New York, Wisconsin, British Columbia and Quebec. The headquarters of the General Telephone Company of the Southwest is

San Angelo, Texas, and it has division offices around the State of Texas, the State of Arkansas, the State of New Mexico and the State of Oklahoma. Plaintiff worked in the division office located in Irving, Dallas County, Texas. At the time that Plaintiff began to work for the Defendant, the Irving Division included Irving, Carrollton, Grapevine, Azle, Keller, and Lewisville, Texas. Subsequently, the Irving Division was restructed to include only Irving, Texas. At all times Plaintiff has worked in all of the cities mentioned at one time or another.

3. The Irving facility today employs approximately 526 employees, of which approximately 66 are management or salaried employees, the others are hourly paid employees. Of the 66 management or salaried employees only one is a Mexican-American.

4. Upon completing his training course provided by the Defendant in construction fundamentals, the Plaintiff was employed by the Defendant in the position of Ground Worker, the lowest position in a line of progression in that area. After approximately 30 days, the Plaintiff was promoted to Line Worker, and subsequently Line Worker-In-Charge by the end of his first year. Presently, the Plaintiff is a Cable Splicer and his salary at the present time is $6.68 per hour.

5. Plaintiff attended various schools while employed by the Defendant company including Ready Access Terminals, Burying Cables, Job Planning (Supervisory), Installer Repairman, and Cable Splicer Fundamentals. The Plaintiff successfully completed all of the courses and, in addition, received commendations from his supervisors for the excellent work he did for the company.

6. Plaintiff applied for a salaried management position on numerous occasions but was never promoted out of the hourly group, although others who were Caucasians were promoted over Plaintiff even though Plaintiff had more seniority and related skills. An example of

Caucasians promoted over the Plaintiff are Randy Rialey, Garry Hoffman, Jerry Eden and Felix Sowell.

7. The Company has a policy of promoting from within and the supervisors of the Plaintiff have so been promoted, none of them having started with any related telephone companies of Defendant and without communications experience. Examples of supervisors who have started with similar positions in the company are Lloyd Goldsman and Harvey Sumner.

8. When a vacancy occurs in a salaried management position there is no formal posting procedure for hourly employees to be made aware of the vacancies. Supervisors of hourly employees may elect to make recommendations for promotions if an hourly employee has indicated his desire to move into the salaried management force. Plaintiff indicated this desire on numerous occasions and although being recommended for a salaried management position by Supervisor Harvey Sumner, he was not promoted into the salaried work force at any time.

9. Plaintiff was qualified and should have been promoted to Supervision Foreman or Inspector when Garry Hoffman and Felix Sowell were promoted to Crew Foreman and Randy Rialey and Jerry Eden were promoted to Inspector. The criteria used to promote salaried employees to management promotions are subjective and are not based on objective criteria. The subjective criteria lend themselves toward abuses and Plaintiff was not promoted because of his national origin in spite of the fact that he was rated as well as if not better than, the others promoted above him in the evaluations performed by his supervisors.

10. Plaintiff filed a charge of discrimination on October 17, 1972, with the Equal Employment Opportunity Commission alleging discrimination because of his national origin, because of his lack of being promoted and

because of the class wide discrimination practiced by the Defendant company. At the time Plaintiff filed his charge of discrimination he was a Lineman-In-Charge and the line of progression was from Groundsman, to Lineman, to Lineman-In-Charge, to Inspector, to Crew Foreman and to Construction Foreman. Bill Hamrick and the Plaintiff were made Lineman-In-Charge at the same time, but Bill Hamrick was subsequently promoted to Construction Foreman. Garry Hoffman was hired in late 1970 and was promoted from Groundsman to Inspector within a six month period, two months later he was made Crew Foreman and two months later he was made Construction Foreman. Randy Rialey was hired in late 1970 and was promoted from Lineman to Inspector within one year. Jerry Eden was hired in April 1972 as a Lineman and was promoted to Inspector in September, 1972. All of these promotions were done in a shorter period of time than the Plaintiff, who was never promoted to a salaried position.

11. The EEOC made a finding and determination on January 29, 1974, which held that the timeliness and all other requirements of Title VII had been met by the Plaintiff and that the Defendant was an employer under the definition of the Act.

The determination by the EEOC concluded that the evidence supported the charge. Plaintiff submitted the entire investigation and supporting data compiled by the EEOC as Plaintiff's Exhibit Number One, which the Court considers relevant evidence in this matter. The EEOC concluded that other Anglo's who were promoted over the Plaintiff in the past revealed that the Plaintiff was more qualified, had more experience, had equal or higher evaluations and had been with the Defendant longer that the Anglo's promoted above him. The EEOC concluded that Title VII of the Civil Rights of 1964, as amended, had been violated by the Defendant, for (1) failing to promote the Plaintiff because of his national

origin and (2) failing to hire Mexican-Americans as a class.

12. Plaintiff received a Notice of Right to Sue letter dated January 21, 1975, and instituted this action in the United States District Court for the Northern District of Texas on April 3, 1975.

PROPOSED CONCLUSIONS OF LAW AS TO MARIANO FALCON'S INDIVIDUAL CLAIM

1. This Court has jurisdiction of this cause of action under 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981.

2. Defendant has discriminated against Plaintiff in the terms, conditions, and privileges of employment.

3. Plaintiff is entitled to relief and is to be promoted to the next available salaried management position in his line of progression.

4. Plaintiff is entitled to recover back wages computed from the date he should have been promoted to the salaried management position and was not, including interest at the legal rate.

5. Plaintiff is entitled to the recovery of attorney's fees for the use and benefit of his attorney.

6. Any finding of fact deemed a conclusion of law is so adopted. Any conclusion of law deemed a finding of fact is so adopted.

PROPOSED FINDINGS OF FACTS ON THE CLASS

1. Plaintiff is a Mexican-American who works for Defendant in Irving, Dallas County, Texas. Plaintiff was hired by Defendant on July 7, 1969, under the program known as Operation Attainment, and subsequently commenced to work as a Ground Worker, which is in the

lowest pay group in Defendant's Irving facility. Plaintiff was initially employed in the Irving Division which was subsequently divided in 1971. Plaintiff presently holds the position of Cable Splicer, which is in the highest pay group of hourly paid positions in Defendant's Irving Division.

2. Defendant is a public utility corporation, a wholly owned subsidiary of General Telephone and Electronics, and provides telephone service in the State of Texas, the State of New Mexico, the State of Oklahoma and the State of Arkansas. Defendant's headquarters is in San Angelo, Texas, and Defendant has various area and division offices which serve the above referenced states. In 1969, when Plaintiff commenced to work for the Defendant company in the Irving Division, the Irving Division consisted of Defendant's facilities in the City of Irving, Keller, Grapevine, Lewisville, Carrollton and Azel, Texas. In 1971, the Irving Division was divided and the Irving Division presently consists of facilities located in Irving, Dallas County, Texas. The Irving facility today employs approximately 526 employees, of whom approximately 66 are management or salaried employees and the other are hourly paid employees. Defendant has had only one Mexican-American in management or salaried positions in the Irving facility.

3. Plaintiff instituted this action on April 3, 1975, individually and as a representative of the class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. At a Pre-Trial hearing held on July 24, 1975, pursuant to Rule 16 of the Federal Rules of Civil Procedure, the Court Ordered that discovery be completed and that the Plaintiff amend his pleadings to define the class and narrow the issues. At a Pre-Trial conference held on October 10, 1975, pursuant to Rule 16 of the Federal Rules of Civil Procedure, the Court Ordered that the case proceed as a class action and that the Plaintiff was to represent the class. The Court certified the class to be made

up of ". . . those employees who are employed and employees who have applied for employment in the Irving Division of the Defendant company and no other division." On February 20, 1976, the Defendant filed a Motion to Reconsider Certification of A Class and pursuant to said Motion the Court entered an Order on March 11, 1976, denying the Motion To Reconsider The Certification Of A Class and Ordered that this ". . . action shall proceed as a class action."

4. At the time that the Court entered the Order certifying the class action, it was demonstrated that the class consisted of 17 Mexican-Americans and 12 Black Americans who were members of the class. Subsequent discovery indicated that during the period of January 1973 to July 1976, a total of 71 Mexican-Americans had applied for jobs with the Defendant company and a total of 118 Black Americans applied for jobs with the Defendant company. During the trial it was determined that during the years 1973 through July 30, 1975, a total of 129 Mexican-Americans had applied for positions with the Defendant company. The Court finds that the class as certified in its previous Pre-Trial orders shall remain in full force and effect, subject to the future determination of additional class members.

5. There are 76 different job positions in Defendants Irving facility and Mexican-Americans have not been employed in the following categories:

> Administrative Clerk, Area Employment Representative, Assignment Foreman, COE Construction Supervisor, COE Installation Foreman, Cable Foreman, Cable Splicer Helper, Central Office Foreman, Central Office Repair Person, Combination Person, Communication Consultant, Communication Specialist, Construction Foreman, Contact Supervisor, Crew Foreman, District Manager, Division Building Foreman, Division Construction Supervisor, Division Manager, Division Services Facilities Manager, Division

Service Office Manager, Division Supply Foreman, Equipment Installer Helper, Facility Person, Facilities Service Supervisor-COE, Facilities Service Supervisor I & M, Field Drafter, Field Person, Garage Mechanic, General Clerk, House Utilities Attendant, Inspector OSP, Instructor, Instructor-Advanced, PBX Repair Person, Phone Mart Manager, Plant Foreman, Project Coordinator, Records Supervisor, Reports and Records Clerk, Secretary-Stenographer, Senior Consultant, Senior Plant Engineer, Service Office Supervisor—Contact—Records, Service Order Typist, Special Services Foreman, Stock Person, Store Keeper, Supervisor COE Installation Foreman, Test Assignment Supervisor, Test Dispatch Foreman, Test Board Person, Training Supervisor, and Unit Sales Manager.

6. The Court finds that an analysis on upgrade of all positions within the company of the Defendant from June 1973 to July 1976 is as follows:

(1) TOTAL NUMBER OF UPGRADES: ALL DIVISION IN NORTH TEXAS AREA, 234

Year	Total
1973	92
1974	45
1975	62
1976	35
TOTAL	234

(2) TOTAL NUMBER OF UPGRADES: IRVING DIVISION, 150

White	Black	Mexican-American
76 Males	7 Males	6 Males
51 Females	7 Females	3 Females
TOTAL 150		

(3) PERCENTAGE PER GROUP

White	Black	Mexican-American
84.67%	9.33%	6.00%

(4) MEXICAN-AMERICANS UPGRADED PER YEAR:

1973	3 Males
1974	0
1975	5, 3 Males,* 2 Females
1976	1 Male

* NOTE: Plaintiff is included here as upgraded to Cable Splicer on August 17, 1975.

(5) UPGRADES WITHIN MANAGEMENT: TOTAL 20

White	Black	Mexican-American
18 - 90.00%	2 - 10.00%	0 - 00.00%

UPGRADES FROM FIELD TO MANAGEMENT: TOTAL 9

White	Black	Mexican-American
9 - 100.00%	0 - 00.00%	0 - 00.00%

7. The Court finds that an analysis of Mexican-American applicants from January 1973 to July 1976 with the Defendant company is as follows:

(1) TOTAL APPLICANTS: 71 45 Females 26 Males

Year	Males	Females	Total
1973	6	4	10
1974	8	8	16
1975	8	19	27
1976	4	14	18
TOTAL	26	45	71

(2)	Females	Males	Total
Clerical	39	4	43
General Clerk	2	0	2
Comm. Consultant	0	1	1
Lineman	1	12	13
Lineworker	2	5	7
Line Person	1	0	1
Cable Spl. Help.	0	1	1
Mechanic	0	3	3
TOTAL	45	26	71

8. The Court finds that an analysis of Black Applicants during the period of January 1973 to July 1976 with the Defendant company is as follows:

(1) TOTAL APPLICANTS: 118

Year	Males	Females	Total
1973	7	21	28
1974	5	31	36
1975	13	29	42
1976	4	8	12
TOTAL	29	89	118

(2)	Females	Males	Total
Clerical	71	7	78
General Clerk	3	0	3
Office Clerk	3	0	3
Comm. Consultant	1	0	1
Lineman	1	2	3
Lineworker	1	14	15
Line Person	0	1	1
Cable Spl. Helper	0	2	2
Repair Clerk	5	0	5
Service Order Typist	4	0	4
Truck Driver	0	3	3
TOTAL	89	29	118

9. The Court finds that an analysis on persons hired from the period of July 1, 1972 to July 1, 1976 with the Defendant company is as follows:

(1) TOTAL HIRED: 338 ALL DIVISIONS IN NORTH TEXAS AREA

		White		Black		Mexican-American		
Year	Total	Male	Female	Male	Female	Male	Female	Other
1972	26	7	18	1	0	0	0	0
1973	96	23	54	0	13	2	4	0
1974	73	7	49	0	8	0	7	2
1975	105	40	60	1	2	0	4	0
1976	36	4	32	0	0	0	0	0
TOTAL	338	81	213	2	23	2	15	2
TOTAL %	100.0%	23.7%	63.1%	.5%	6.8%	.5%	4.4%	.5%

(2) TOTAL HIRED: 168 IRVING DIVISION

		White		Black		Mexican-American		
Year	Total	Male	Female	Male	Female	Male	Female	Other
1972	20	4	15	1	0	0	0	0
1973	69	14	45	0	6	0	4	0
1974	40	2	24	0	6	0	6	2
1975	31	2	25	0	1	0	3	0
1976	8	3	5	0	0	0	0	0
TOTAL	168	25	114	1	13	0	13	2
TOTAL %	100.0%	14.93%	67.83%	.59%	7.73%	.0%	7.73%	1.19%

10. The Court finds that a comparison of Mexican-Americans with the total work force with the Defendant company is as follows:

Year	Total Employees	Mexican-Americans Employees	% Mexican-Americans	Gain or Loss From Previous Year	
				Employees	M.A.
12/70	479	8	01.67%		
12/71	542	7	01.29%	+63	−1
* **12/72	652	8	01.22%	+110	+1
12/73	714	13	01.82%	+62	+5
7/74	671	24	03.57%	−43	+11
1/75	618	28	04.53%	−53	+4
***6/75	615	27	04.39%	−3	−1

* GSA Letter written to company on May 12, 1972 setting out areas of underepresentation for Mexican-Americans in the following job categories:

Officials and Managers (all levels)[1,2]
Professionals[2]
Technicians[1,2]
Office/Clerical (Skilled)[1]
Skilled Craft

** Plaintiff filed charge with EEOC October 17, 1972

*** Plaintiff filed Original Complaint April 3, 1975

[1] The GSA Letter also set out these areas of underepresentation for Black Americans.

[2] The GSA Letter also set out these areas of underepresentation for Females.

SOURCE: Defendant's Answers to Plaintiff's First Set of Interrogatories Nos. 5 and 6.

The Court finds that of applicants for the position of Line Worker with the Defendant company there were 210 applicants, 181 Anglo of which 16 were hired for a hiring rate of 93.8%, 17 Mexican-American applicants of which none were hired for a 0.00% hiring rate and 12 Black Americans of which 1 was hired for a 6.2% hiring rate.

11. The Court finds that the Defendant company is primarily staffed in its salaried management positions by White Male Americans and that the promotions to salaried positions are from within the company. The Court further finds that from the period 1972 through and including 1976 in the Irving Division, no male Mexican-Americans were hired and 13 female Mexican-Americans were hired, but that since the company is predominately white male oriented in its salaried positions, that the non-hiring of Mexican-American males is discriminatory toward the entire class.

12. The Court finds that the Dallas-Ft. Worth standard metropolitan statistical area and the total labor force is as follows:

TOTAL LABOR FORCE

Male	60.7%
Female	39.3%
Black	12.8%
Male	6.7%
Female	6.1%
SSA	5.2%
Male	3.4%
Female	1.8%
OTHER	0.5%
Male	0.3%
Female	0.2%
Anglo-Cau.	81.5%
Male	50.4%
Female	31.1%

13. The Court finds that the Defendant has an Affirmative Action Plan that has been in existence for some time, but that the plan is deficient in both its content and implementation. Furthermore, each of the Defendant's facilities has such a plan, including the facility designated the Irving Division, but not all of the employees of the Irving Division are covered under the plan presented to the Court. Different plans cover different divisions and the Affirmative Action Plan for each of the Defendant's divisions is different. The Court finds that the Affirmative Action Plan covering the Irving Division is deficient and does not provide the relief necessary to minorities.

14. The number and percent of Defendant's total labor force in its Irving Division who are Mexican-Americans from December 1970 through June 1975 were as follows:

Date	Total Number of Employees	SSA Employees	% SSA Employees
12/70	479	8	1.67%
12/71	542	7	1.29%
12/72	652	8	1.22%
12/73	714	13	1.82%
7/74	671	24	3.57%
1/75	618	28	4.53%
6/75	615	27	4.39%

These figures clearly demonstrate that Mexican-Americans have not been hired in accordance with their percentage in the labor force, and particularly so into salaried and management positions of the Defendant company.

15. The Defendant company provides training courses for all of its employees at company expense and on company time. The courses are based primarily on the needs of the company, but preferences are given to employee training assignment. Management training in specific areas is available for some management employees, but not generally so for Mexican-American employees.

16. Promotions from hourly paid jobs to salaried management positions are based on recommendations of supervisors and area personnel office supervisors. The decision as to who will be promoted into management is made jointly by the various supervisors including the area personnel officer. Management promotions are based on leadership potential, which is judged by several factors, including job knowledge, experience, communicative skills, judgment and attitude. All of these criteria are subjective and can be the basis for discriminatory actions.

PROPOSED CONCLUSIONS OF LAW REGARDING CLASS CLAIMS

1. This is a proper class action because the Plaintiff fairly and adequately represents and protects the interest of all of those whom he asked to represent and the Court's certification of a class in Pre-Trial orders is to continue in effect, subject to enlargement of the class.

Defendant has discriminated against Mexican-Americans as a class in terms, conditions, and privileges of employment, and has particularly done so in the Irving Division both prior to 1971 and after the restructuring of the Irving Division in 1972. The Defendant company has not recruited Mexican-Americans at the Irving Division facilities and has particularly not hired Mexican-American males whom would have the best chance of being promoted to salaried management positions.

Mexican-American members of the class are entitled to back wages, as is to be determined by the Court at a proper hearing. Plaintiff and the class he represents is entitled to reasonable attorney's fees to be determined by the Court upon proper hearing.

2. The Affirmative Action Plan of the Defendant is deficient and the Defendant will, within 30 days of the entering of this Order, provide the Court and Plaintiff's Counsel with an Affirmative Action Program which is

meaningful for minorities and women with the Defendant company. An example of an appropriate Affirmative Action Program on a company-wide basis, not limiting the Affirmative Action Program to the Irving Division, is attached hereto and incorporated herein as Exhibit 1.

In addition, and in order to accelerate the Affirmative Action Plan, Defendant is ordered to take the following steps immediately to more actively recruit and promote Mexican-Americans at its Irving facility and at the proper determination, in all of the other divisions within the parameter of the Defendant company. The Defendant company is to do as follows:

(a) Defendant will recruit SSA employees through the use of Spanish language newspapers and through the use of employment agencies that specialize in the placement of SSA's, as well as other minorities. Defendant will recruit at schools with a high SSA enrollment. Defendant will encourage in writing all SSA employees in the Irving facility to recruit their friends for employment with Defendant.

(b) In order to make more SSA's available for openings in management jobs, each SSA employee, on their own initiative, may submit their name and qualifications to their immediate supervisor for consideration for any management job which the employee specifies. The immediate supervisor must review the qualifications of each such employee and submit the names, qualifications and jobs requested to the area personnel office. An area personnel officer must respond to each such employee within a reasonable time and advise them of any weakness in their qualifications that might hamper their being promoted into a requested management job. If there are no such weaknesses in an employee's qualifications, he or she will be considered for each opening thereafter occurring in each position that the employee listed for which he or she is qualified. Each time a qualified SSA em-

ployee is not selected for an opening, the area personnel office must so notify the employee and explain why he or she was not selected. If an employee's qualifications are weak, an area personnel officer will advise each such employee of his or her weakness or weaknesses and of suggested training that should improve those weak areas. After each such employee has improved those areas in which they were weak, they may then resubmit their name, qualifications and jobs requested to the area personnel office.

(c) Defendant will encourage and sponsor training for higher level jobs for SSA's by providing college tuition aid and correspondence course aid for SSA employees who apply for such aid. The aid provided will be a refund of 75% for all tuition, registration fees and required books for all courses completed with a grade of A or B, or an equivalent, all such aid being subject to withholding tax. The maximum aid available for any one calendar year is $500 and is based on the following terms:

(1) The employee must be a full time employee who has been employed by Defendant for at least six months.

(2) The school or course must be accredited by the appropriate association or council, or approved by Defendant.

(3) The employee must have a current performance rating of good, very good or excellent.

(4) The desired course of study must be on a subject which is a direct technical skill or knowledge requisite of the employee's present job or a job to which he or she aspires and has a reasonable chance of attaining.

(5) School attendance must be on an employee's own time; however, for a course essential to an employee's development which is available only during working hours, a special work assignment schedule may be made if the requirements of the job permit. In such cases,

hourly paid employees will be paid only for the hours worked, and salaried employees will be expected to work the normal number of hours in the pay period.

(6) Only courses which are stated and completed while the applicant is employed by Defendant will be subject to eligibility for tuition aid.

(8) Any time an employee is turned down for tuition aid, or a course or school is not approved, a written explanation from an area personnel officer must be transmitted to such employee.

(d) In addition to the tuition aid program and in addition to the training already provided by Defendant, Defendant will provide certain home study courses for SSA employees to be completed on the employee's own time. All such courses must be on a subject which is a direct technical skill or knowledge requisite of the employee's present job or a job to which he or she aspires and has a reasonable chance of attaining.

(e) The manager of the Irving facility will hold monthly staff meetings, which shall be attended by all staff members work-in the Irving facility, regardless of their reporting lines, at which time minority awareness and affirmative action will be one of the topics discussed. All staff members in the Irving facility, regardless of their reporting lines, will have quarterly meetings with their second level management employees at which time minority awareness and affirmative action will be one of the topics discussed. All second level management employees working in the Irving facility, regardless of their reporting lines, will have quarterly meetings with their first level management employees at which time minority awareness and affirmative action will be one of the topics discussed. At all of these meetings, the goals for the employment of SSA's at all job levels and the statistics concerning the attainment of those goals will be reviewed.

(f) The manager of the Irving facility will insure that all management level employees working in the Irving facility are informed of the fact that their future advancement with Defendant will depend in part on their attainment of their affirmative action goals and their treatment of SSA employees.

(g) Defendant will make a good faith effort to fill its openings in management level positions in its Irving facility with qualified SSA's until at least 5.24% of its management employees in the Irving facility are SSA's; and Defendant will make a good faith effort to maintain a minimum of 5.24% SSA's in management positions in the Irving facility at all times.

(h) Defendant will advise in writing all SSA employees in its Irving facility of the terms of paragraphs (b), (c) and (d) of this order.

(i) The Court shall be provided with copies of the notices required by paragraphs a and h of this order. The Court shall also be provided with all copies of Defendant's EEO-1 reports which cover employees who work in the Irving facility.

(j) This order shall remain in effect until the percent of SSA's employed by Defendant in its Irving facility is at least 5.24% and the percent of SSA's employed in management level jobs at Defendant's Irving facility is at least 5.24% and until both such levels have been maintained for a continuous six months period, at which time this portion of this order will automatically expire. The Court and Plaintiff's attorney must be provided with an affidavit from Defendant that the percentage levels for the required period of time have been achieved.

3. All other portions of this order shall remain in effect for a period of three years, unless modified by the Court.

4. Any finding of fact deemed a Conclusion of Law is so adopted. Any conclusion of law deemed a finding of fact is so adopted.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the foregoing Proposed Findings of Fact and Conclusions of Law be entered by the Court.

Respectfully submitted,

HERNANDEZ, INC.
1700 Fidelity Union Tower
Dallas, Texas 75201
(214) 747-1632

By: /s/ Frank P. Hernandez
FRANK P. HERNANDEZ, Attorney
for Plaintiff

[Filed December 7, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

ORDER RE MOTION TO AMEND CLASS

On this the 22 day of March 1977, came on for consideration Plaintiff's Motion to Amend the Class heretofore defined at a pretrial hearing in the above entitled and numbered cause. The Court has considered the pleadings, the evidence, the Findings and Conclusions as found by the Court and the briefs and arguments of attorneys for the parties.

The class as heretofore found by the Court is those Mexican-Americans who are employed at the Irving facility of General Telephone Company of the Southwest and those Mexican-Americans who have applied for employment in the Irving facility.

After full consideration the Court is of the opinion the class should not be amended.

It is therefore ORDERED, ADJUDGED and DECREED that the Motion to Amend is hereby DENIED.

/s/ Sarah T. Hughes
United States District Judge

[Filed March 22, 1977]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Defendant, General Telephone Company of the Southwest ("General Telephone"), and files its Brief in Support of its Motion for New Trial and would show the Court as follows:

I.

THERE IS NO EVIDENCE TO SUPPORT THE JUDGMENT FOR THE INDIVIDUAL PLAINTIFF

The facts concerning the promotion history of Plaintiff, Mariano S. Falcon ("Falcon"), are virtually undisputed. Falcon, an uneducated and unskilled worker, came to work for General Telephone in July, 1969 pursuant to a program designed to hire and train hard core, unemployed minorities. Falcon had been promoted to the highest paying job within the bargaining unit by the time of trial. Nonetheless, Falcon claimed that several Caucasians, with less seniority than he, had been promoted ahead of him because of his national origin.

Promotions at General Telephone are based not only on seniority, but also training and experience. It is only where all prospects are equal in training and experience, that seniority governs in promotions within the bargaining unit; and for management jobs, seniority is not considered at all. Each Caucasian who Falcon claims was discriminatorily promoted ahead of him had experience in related fields prior to coming to work for General Telephone. Furthermore, in each case their related experience pre-dated Falcon's employment with General Telephone; and in each case their seniority in skills required by General Telephone was greater than Falcon's.

While Falcon may have been senior as an employee at General Telephone to those Caucasians who were promoted prior to his promotions, he was inferior in training and experience as to all of them.

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), requires that decisions concerning employment practices, including promotions, be resolved without regard to race or national origin. *Id.*, § 2000e-2. This means that if Falcon had been promoted ahead of the more experienced and more well trained Caucasians, General Telephone may then have been in violation of Title VII.

In addition to his failure to demonstrate that he was as qualified for the various positions he sought as the Caucasians who received the promotions, Falcon failed to show any evidence concerning the number and types of openings which have been available at General Telephone since he has been employed. Even under the loose standard set by the Supreme Court in *McDonell Douglas Corp v. Green*, 411 U.S. 792 (1973), Falcon failed to prove a prima facie case. Falcon showed only that he applied for an opening and that it was filled by a Caucasian. He did not show that he was qualified for the opening; nor could he have, since the evidence was undisputedly to the contrary. Falcon, therefore, failed to sustain his burden of proof in showing discrimination by General Telephone on account of his national origin.

Furthermore, Falcon was offered, and voluntarily refused, a promotion prior to any of the promotions at issue here. On July 10, 1970, within one year of his employment with General Telephone, General Telephone offered to promote Falcon to the position of installer repair person. Had he accepted that promotion, he would have been in the second highest pay group among hourly workers. He would also have been in a more favorable position to move into higher job levels with General

Telephone. On his own volition, however, he refused to accept the promotion. It is totally unjust that he now be allowed to profit from his own actions by claiming that General Telephone refused to promote him because of his national origin. Even under the liberal auspices of Title VII, a claimant is required to mitigate, rather than exacerbate his injury. 42 U.S.C. § 2000e-5(g); *Ruckel v. Essex International, Inc.*, 14 BNA FEP Cases 403 (N.D. Ind. 1976).

Coupled with the foregoing was the undisputed testimony of Falcon's supervisors that he had shown poor judgment on several occasions in the past. Yet the positions for which he claims he was not given a fair opportunity are positions of leadership, which require a person with good judgment. In addition, Falcon's output as a lineworker-in-charge was shown to be the lowest among his peers. Had Falcon sustained his burden, General Telephone sufficiently rebutted his claim by showing valid reasons for not promoting him into the positions which he claims should have been his. In summation, there was simply no evidence to support the Judgment for Falcon.

II.

THE COURT ERRED IN CERTIFYING A CLASS WHICH INCLUDES MEXICAN-AMERICANS WHO WERE NOT HIRED

Falcon, a Mexican-American employee, is not a Mexican-American applicant who was not hired; therefore he is not a member of the class for whom relief was granted. Falcon cannot represent a class of non-hired Mexican-Americans simply because he is a Mexican-American. As noted by the Fifth Circuit in *Palmer v. Thompson*, 391 F.2d 324, 328 (5th Cir. 1967):

> "All members of the particular race are not automatically members of the deprived class simply be-

cause they are of the same race as the members of the class."

In addition to the cases cited in Defendant's previous briefs, Defendant calls the Court's attention to the recent Fourth Circuit opinion in *Doctor v. Seabord Coast Line R.R. Co.*, 540 F.2d 699 (4th Cir. 1976). There the court refused to allow a plaintiff whose personal claim was inadequate representation by a union, and not discriminatory hiring, from representing a class which included applicants who were not hired. The reasoning there should be compelling on this Court:

> "Rule 23(a) sets forth the 'mandatory requirements' that must be satisfied for the maintenance by a plaintiff of a class action; and, while suits involving racial discrimination lend themselves generally to class treatment, a plaintiff does not satisfy the burden that is his in order to qualify as a proper representative to maintain such an action merely because of his or her race or because he designates his action as a class action." 540 F.2d at 706.

The requirement that a class representative be a member of the class has Constitutional roots, in that it is intertwined with the case or controversy requirement of Article III. U.S. Const. art. III, § 2. The Supreme Court has noted that a named plaintiff who does not seek the same relief for both himself and a class fails to meet the case or controversy requirement. In *O'Shea v. Littleton*, 414 U.S. 488 (1974), the Court said:

> "Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." 414 U.S. at 494.

In addition to his not being a non-hired applicant, Falcon did not proceed through the normal applicant channels for employment at General Telephone. Falcon

was hired pursuant to a special program by General Telephone designed to recruit hard core, unemployed minorities. His application, therefore, was not similarly situated with other Mexican-American applicants. Falcon has no relationship whatsoever to non-hired applicants, and the court has erred in including non-hired applicants within the class he represents.

Nor should this Court rely on the fact that it found discrimination in favor of the non-hired applicants in determining whether this was a proper class action. That determination should *not* be based on the outcome of the litigation, but should be made without regard to the merits. As a matter of law, Falcon is not a member of the class and, as a matter of law, he cannot represent the class. *See, Bailey v. Patterson*, 369 U.S. 31 (1967).

Several recent cases have noted that employees cannot represent persons denied employment and persons dismissed. *See, e.g., Barrett v. Civil Service Comm'n.*, 11 BNA FEB Cases 1089 (D. D.C. 1975); *Morris v. Connecticut General Insurance Corp.*, 9 BNA FEP Cases 66 (D. Conn. 1974); *Causey v. Ford Motor Co.*, 8 BNA FEP Cases 353 (M. D. Fla. 1974). In each of the cited cases a plaintiff was not permitted to represent others of his or her race simply because of the racial bind. There must be a more sufficient nexus than racial similarity between the plaintiff and the class in order to allow someone to represent a class. *See, Wells v. Ramsay, Scarlett & Co.*, 506 F.2d 436 (5th Cir. 1975). That nexus is totally absent here.

III.

THE COURT HAS NO JURISDICTION OF THE CLAIMS CONCERNING APPLICANTS

The charge filed by Falcon with the Equal Employment Opportunity Commission ("EEOC") in October, 1972 stated only that he had not been promoted because

of his national origin. There was no reference whatsoever to any claim that General Telephone had discriminated against Mexican-Americans in hiring.

Furthermore, the EEOC investigator testified that he did not confer with any official of General Telephone in making his determination. The only persons that were interviewed were two friends of Falcon's who made contentions similar to Falcon's on behalf of themselves, even though they were Caucasians.

In January, 1974 the EEOC rendered its decision that General Telephone had discriminated against Mexican-Americans in hiring. That was the first indication that General Telephone had that its hiring practices concerning Mexican-Americans were being investigated by the EEOC.

For that reason, the records in this trial concerning applicants and hiring are incomplete prior to 1973. For example, there was no data kept by General Telephone concerning the names, number or national origin of applicants prior to 1973.

The statistics prior to 1973, therefore, should be viewed skeptically. From 1973, when the records are available, the undisputed facts showed that General Telephone hired considerably more Mexican-Americans from its applicant pool than were available in the relevant labor market.

Because of the EEOC's concealment of the fact that it was investigating General Telephone's hiring practices with regard to Mexican-Americans and because of the failure of the charge filed by Falcon to include a claim of discriminatory hiring, the court should not at this juncture require General Telephone to defend its hiring practices. It was error, therefore, for the court to allow Falcon to claim that General Telephone discriminated in hiring with regard to Mexican-Americans.

IV.

GENERAL TELEPHONE'S AFFIRMATIVE ACTION PLAN IS NOT WITHIN THE JURISDICTION OF THIS LAWSUIT

Falcon's claims in this lawsuit, both individually and for the class, are based on Title VII and the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("§ 1981"), neither of which requires affirmative action. *Walthall v. Blue Shield*, 12 BNA FEP 933 (N.D. Cal. 1976); *and see, Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974). Affirmative action plans are required to be filed by government contractors by Executive Order 11246, 3 C.F.R. 169 (1974).

The Fifth Circuit has held that there is no private right of action to enforce executive orders concerning discrimination in government contracts. *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967). Otherwise a government contractor, such as General Telephone, would be required to answer to two masters—a federal court and the President of the United States. The dilemma posed by that situation is obvious and is patently unfair.

Furthermore, there was no claim in Plaintiff's Complaint that Defendant's affirmative action plan was deficient; nor was there an amendment at trial to present such a claim. It was both beyond the Court's jurisdiction and erroneous for this Court to make any order concerning Defendant's affirmative action plan.

V.

THE COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT DEFENDANT HAS DISCRIMINATED IN ITS HIRING POLICIES

While it has become commonplace to state that statistics speak and courts listen with regard to civil rights

actions, it is the *relevant* statistics to which courts should listen. The bare statistics concerning the percentage of Mexican-Americans employed by General Telephone and the percentage of Mexican-Americans available in the community paint an incomplete picture.

In reviewing a great many statistics in a Title VII case, the Fourth Circuit recently noted:

> "But we do not believe that isolated bits of statistical information necessarily make a *prima facia* case when divorced from other and contrary statistics and from the statistical picture of all the employment at the plant. We also think the absence of other evidence of discrimination should be considered in determining whether a *prima facia* case is made, just as the presence of other evidence of discrimination should be considered in arriving at the same conclusion." *Roman v. ESB, Inc.*, —— F.2d ——, 14 BNA FEP Cases 235, 242 (4th Cir. 1976).

The available labor market for General Telephone is, in actuality, those who apply and want to work for General Telephone. The statistical comparison of applicants to hires weighs heavily in favor of General Telephone with regard to minority hiring. The evidence was undisputed and was overwhelming that General Telephone has hired a much higher percentage of Mexican-American applicants than of Caucasian applicants. Those relevant statistics show, as a matter of law, that General Telephone has not discriminated against Mexican-Americans in hiring.

Two Fifth Circuit cases are also most appropriate concerning relevant statistics. First, in *Ochoa v. Monsanto Co.*, 473 F.2d 318 (5th Cir. 1973), the court refused to rely on the statistics presented there because of their unreliability. The court noted that there was a small universe which made the statistics questionable at best. The same situation applies here to the use of the

percentage of Caucasians and Mexican-Americans hired by the General Telephone each year. In each instance the total number of persons was less than one hundred, which makes those statistics extremely unreliable.

The other case, *Hester v. Southern Railway Co.*, 497 F.2d 1374 (5th Cir. 1974), involved a claim of discriminatory hiring, and demonstrated precisely what statistics should be evaluated in a hiring case. There a black female claimed that the defendant was discriminating in hiring because only 19% of its typists were black, while over 50% of the local population was black. The defendant showed that only 22% of the available typists were black and that the difference between 19% and 22% was not sufficient to show discrimination. The Fifth Circuit agreed with the defendant. In discussing relevant statistics it stated:

> "The most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of blacks among those applying for a particular position and the percentage of blacks among those hired for the position." 497 F.2d at 1379.

An application of the Fifth Circuit's ruling in *Hester* to the facts in the present case shows overwhelmingly that Defendant has not discriminated against Mexican-Americans in hiring. For example, in 1973 2.7% of the applicants for jobs at General Telephone were Mexican-Americans and 4% of those hired by General Telephone were Mexican-Americans. In 1974 2.9% of General Telephone's applicants were Mexican-Americans and 13.2% of those General Telephone hired were Mexican-Americans. In 1975 (through July 30), 4% of the applicants for jobs at General Telephone were Mexican-Americans, while 18.8% of those hired for jobs by General Telephone were Mexican-Americans. These facts clearly refute any finding or conclusion that General Telephone has discriminated against Mexican-Americans in hiring and compel

a finding that the court erred in ruling that General Telephone has done so.

VI.

THE COURT ERRED IN ADMITTING THE REPORTS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND THE OFFICE OF FEDERAL CONTRACT COMPLIANCE

Notwithstanding the fact that the Fifth Circuit ordered the admission of a portion of an EEOC report in *Smith v. Universal Services, Inc.*, 454 F.2d 154, 160 (5th Cir. 1972), every other circuit which has ruled on this matter has ruled to the contrary. Furthermore, in the recent case of *Peters v. Jefferson Chemical Co.*, 516 F.2d 447 (5th Cir. 1975), the Fifth Circuit ruled that a failure by the trial court to admit an EEOC report did not warrant a reversal.

In the present case the entire report of the EEOC was admitted. In *Smith* the report admitted was simply the final letter of determination, and not all of the hearsay commentary and self-serving statements which "back up" that determination. That was the distinction noted by the Second Circuit in *Gillin v. Fed. Paper Board Co., Inc.*, 479 F.2d 97 (2nd Cir. 1973), which led it to affirm a decision by the trial court not to admit the entire report compiled by the EEOC. In addition the Sixth and Fourth Circuits have noted that the EEOC report is hearsay, contains numerous self-serving statements and is not a business record. *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13 (4th Cir. 1972); *Moss v. Lane Co., Inc.*, 471 F.2d 853 (4th Cir. 1973); *Heard v. Mueller Co.*, 464 F.2d 190 (6th Cir. 1972).

The rationale of the other circuits, particularly the Second Circuit in *Gillin*, should be compelling here. The report which was admitted here was not simply the determination by the EEOC as approved in *Smith*, but con-

tained numerous documents which were prejudicial to General Telephone and could have been included in the report merely to justify a forced result. As you will recall, the EEOC investigator testified that the Chairman of the EEOC has severely criticized the EEOC investigations during the time period in question here for reaching desired, but unwarranted results.

The admission of the Office of Federal Contract Compliance ("OFCC") reports without the testimony of any investigator was clearly erroneous. While no cases have been found which have ruled on the admissibility of OFCC reports in Title VII cases, there was no predicate for their admission and there was no testimony as to their authenticity.

These reports, which were highly prejudicial to General Telephone, could also have been contrived merely to justify a predilection of the author, if, in fact, they were written by the OFCC. Due to the prejudicial and hearsay nature of these reports, therefore, this court erred in admitting them and should order a new trial to determine this matter without that evidence.

VII.

PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AND BY LACHES

The Supreme Court has made it clear that the statute of limitations on claims based on § 1981 are not tolled pending an EEOC investigation. *Johnson v. Railway Express Agency, Inc.*, —— U.S. ——, 95 S.Ct. 1716 (1975). Furthermore, the most analogous state statute of limitations applies. *Id.* In Texas, the most analogous limitations period is the two year statute. *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974). The matters about which Falcon complained took place from 1969 through 1972. This matter was not filed until 1975; therefore, all claims based on § 1981 are barred by limitations.

In addition, the delay by the EEOC in investigating the hiring claim has caused prejudice to General Telephone by the lack of records concerning Mexican-American applicants and hires in the years prior to 1973. Those records could reveal that General Telephone hired a higher percentage of Mexican-American applicants in the years prior to 1973, just as General Telephone did in 1973 and thereafter. Such evidence would be most compelling in showing that General Telephone did not discriminate in hiring Mexican-Americans.

Furthermore, the allowance of Defendant's laches defense will not prejudice Plaintiff, since he was not injured by the alleged discriminatory hiring practices of General Telephone. Plaintiff's delay, therefore, in bringing this cause of action should bar any claim concerning hiring.

CONCLUSION

For the reasons stated herein, Defendant respectfully prays that this court grant a new trial.

Respectfully submitted,

COKE & COKE

By /s/ E. Russell Nunnally
E. RUSSELL NUNNALLY
3600 First National Bank Building
Dallas, Texas 75202 741-3401

PRESTON, HOLT, HARPER & HIGHTOWER

By /s/ Stephen W. Holt
STEPHEN W. HOLT
P.O. Box 1001
San Angelo, Texas 76901
915-949-9683

[Filed April 11, 1977]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

ORDER

On this the 27th day of March, 1978, came on for consideration in the above-styled and numbered cause the Plaintiff's Motion to Amend Findings of Fact and Conclusions of Law.

Plaintiff has brought his motion under Fed.R.Civ.Proc. 60(a), seeking to characterize the absence of findings for certain specific annual periods as an oversight on the part of the Court. The absence of said findings was not the result of oversight on the part of the Court, nor of any other type of clerical error properly the subject of a Rule 60(a) motion. *See Warner v. City of Bay St. Louis*, 526 F.2d 1211 (5th Cir. 1976). Plaintiff's motion seeks to have additional findings and conclusions added to those that constitute the record at this point, and should have been brought under Rule 52. However, Rule 52 specifies that such a motion to amend must be made within 10 days of judgment, and Plaintiff's motion would, therefore, be untimely.

Plaintiff's Motion to Amend Findings of Fact and Conclusions of Law is DENIED.

So ORDERED, ADJUDGED, and DECREED.

March 27, 1978.

/s/ Sarah T. Hughes
United States District Judge

[Filed March 27, 1978]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

PRE-TRIAL ORDER

On the 30th day of March, 1978, a pre-trial conference was held in the above styled and numbered cause of action; counsel for both the plaintiff and the defendant were present.

Pursuant to such conference, it is hereby ORDERED:

1. The defendant shall furnish to the plaintiff by April 15, 1978, a list of all Mexican-Americans who applied for employment at the defendant's Irving, Texas facility in 1973, 1974 and 1975 and from January 1, 1976 through October 18, 1976 (hereafter "the class").

2. The plaintiff will give notice to the class that such person may be entitled to some type of recovery in this cause of action; such notice must be approved by the Court. Such notice shall be by written correspondence, where possible. Such notice shall also be made three times per week for a two week period on a Spanish speaking radio station in the vicinity of Irving, Texas and shall be published in a Spanish Language newspaper in the vicinity of Irving, Texas for a two week period.

3. Each member of the class who responds to such notice by May 19, 1978 may be eligible to participate in this cause of action.

[Filed April 6, 1978]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

MOTION TO APPROVE NOTICE TO CLASS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes MARIANO FALCON, Plaintiff, and files this his Motion to Approve Notice to Class and show the Court as follows:

I.

Attached hereto as Exhibit "A" is a copy of the proposed notice to be issued to members of the class as found by the Court in its order signed and filed herein on April 6, 1978. Said notice will be placed in El Sol and a similar notice will be broadcast over radio station KESS.

Additionally, members of the class will be contacted by a letter enclosing a copy of the notice.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, MARIANO FALCON, respectfully requests the Court to approve the Notice to the class, attached hereto as Exhibit "A".

Respectfully submitted,

McGUIRE, LEVY, COLLINS & McCURLEY

By: /s/ John E. Collins
JOHN E. COLLINS
3012 North Beltline Road
P.O. Box 5507
Irving, Texas 75062
(214) 255-4127
Attorneys for Plaintiff

ATTENTION: ALL
MEXICAN-AMERICANS
WHO APPLIED FOR WORK AT
GENERAL TELEPHONE CO.
IN IRVING, TEXAS
IN 1972, 1973, 1974, 1975 AND THROUGH
OCTOBER 18, 1976

THE FOLLOWING LAWSUIT IS NOW PENDING IN JUDGE SARAH T. HUGHES' COURT IN DALLAS AND YOUR RIGHTS MAY BE AFFECTED. JUDGE HUGHES HAS FOUND THAT GENERAL TELEPHONE COMPANY OF IRVING, TEXAS, DISCRIMINATED AGAINST MEXICAN-AMERICANS AS A CLASS FROM 1972 TO OCTOBER 18, 1976 AND YOU MAY BE ENTITLED TO BACK WAGES OR OTHER RELIEF UNDER CERTAIN CONDITIONS. *PLEASE READ THE FOLLOWING NOTICE CAREFULLY*:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-75-0403-B

MARIANO S. FALCON,
Plaintiff

VS.

GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST,
Defendant

NOTICE OF PENDENCY OF CLASS ACTION

TO: ALL MEXICAN-AMERICANS WHO APPLIED FOR WORK AT THE IRVING FACILITY OF GENERAL TELEPHONE COMPANY OF THE SOUTHWEST IN 1972, 1973, 1974, 1975, AND UNTIL OCTOBER 18, 1976:

You are hereby notified of the pendency of the above action wherein Plaintiff, MARIANO S. FALCON, seeks monetary relief and an injunction on behalf of himself and the class of Plaintiffs (Mexican-American) which he represents. The complaint includes allegations that Defendant, GENERAL TELEPHONE COMPANY OF THE SOUTHWEST, has practiced unequal employment policies directly resulting in unlawful discrimination against Mexican-Americans. The Plaintiff says that each member of the class suffered damages and that injunctive relief should be granted. This claim of employment discrimination is being maintained as a class action against Defendant.

A hearing will be held on June 26, 1978, in the United States District Court for the Northern District of Texas (Dallas Division) at 1100 Commerce Street, Dallas, Texas, to determine the rights of the Plaintiff and of all Mexican-Americans who applied for work from 1972 up to October 18, 1976 with General Telephone's facility in Irving, Texas. Members of this class may be entitled to back wages or other relief under certain conditions. You are hereby notified that you must signify whether you consider the representation to be fair and accurate and whether or not you wish to intervene and present a claim, or otherwise come into the action by May 19, 1978. Your election to participate in the class action described above should be mailed to the following address:

Joseph McElroy, Jr., Clerk
United States District Court
Dallas Division
1100 Commerce Street
Dallas, Texas 75242

To be valid, your election to come into the action must be postmarked no later than midnight, May 19, 1978.

For further information concerning this cause you may contact either of the lawyers representing the Plaintiff:

Mr. George Solares
2719 McKinney Avenue
Dallas, Texas 75204
Telephone: area code 214—823-7560

or

Mr. John E. Collins
3012 N. Beltline Road
Irving, Texas 75062
Telephone: area code 214—255-4127
or Metro: 256-1761

DO NOT CONTACT THE COURT, THE CLERK'S OFFICE OR THE DEFENDANTS IF YOU HAVE ANY QUESTIONS ABOUT THIS MATTER. ANY QUESTIONS SHOULD BE DIRECTED TO EITHER OF THE ABOVE ATTORNEYS FOR THE CLASS.

Joseph McElroy, Jr.
Clerk, United States District
Court for the Northern District
of Texas—Dallas Division

IF YOU CHOOSE TO PARTICIPATE
MAIL THIS ACTION

CLAIM FORM

TO: JOSEPH McELROY, JR., Clerk
United States District Court
Dallas Division
1100 Commerce Street
Dallas, Texas 75242

RE: Falcon v. General Telephone Company
of the Southwest
Civil Action No. 3-75-0403-B

NAME: _____
(Print your name)

ADDRESS: _____
(Print your current address)

I hereby make a claim for back wages.

_____
(Your signature)

RETURN THIS FORM BY May 19, 1978, TO CLAIM
BACK WAGES

[Filed April 21, 1978]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

ORDER

The Court has examined the notice attached to Plaintiff's Motion to Approve Notice to Class and hereby approves that proposed notice. Plaintiff is to proceed with the issuance of this notice by means of written correspondence, newspaper advertisement and radio advertisement.

SIGNED this the 1st day of May 1978.

/s/ Sarah T. Hughes
United States District Judge

[Filed May 1, 1978]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

PRE-TRIAL ORDER

The Court having been apprised of Plaintiff's difficulties in issuing the approved Notice to the Class, it is hereby ordered:

1. That each member of the Class will have until Friday, June 2, 1978, within which to respond to the Notice to be issued by Plaintiff in this cause.

2. The Defendant will serve interrogatories on the Class, through its attorney, no later than Friday, June 2, 1978. Each member of the Class who intends to present a claim must respond to such interrogatories no later than June 23, 1978; any member of the Class who does not respond to such interrogatories properly and completely will not be permitted to present a claim or otherwise participate herein.

3. At 11:00 a.m. on Thursday, June 29, 1978, a Pre-Trial Conference will be held in this matter.

4. All discovery must be completed by Friday, June 30, 1978.

5. On July 10, 1978, a trial will be held on the merits of the claim of each member of the Class who has timely responded to the Notice to the Class and who promptly and completely responds to the Defendant's Interrogatories to the Class.

SIGNED AND ENTERED this the 3rd day of May, 1978.

/s/ Sarah T. Hughes
United States District Judge

[Filed May 5, 1978]

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

[EXCERPTS FROM TRIAL TRANSCRIPT]

[Testimony of John Collins—Transcript
pp. 200-21]

[280] DIRECT EXAMINATION

BY MR. COLLINS:

MR. COLLINS: My name is John E. Collins. I am a lawyer. I am licensed to practice law in the State of Texas. I have been practicing law in the State of Texas since December of 1966 and I have been practicing law here in Dallas County since that time with the exception of one year when I practiced law in Austin, Texas.

I was asked by Judge Hernandez to assist him with the legal representation in this case back in November of last year, 1977, and since that time I have kept time records and memoranda from which the Plaintiff's Exhibit 18 was prepared describing the legal services which have been rendered in this case and the total hours I think appear at the end of Plaintiffs' Exhibit 18 comes to one hundred twelve hours attorney time, lawyer time in the case and another forty-five hours paralegal time in our office that was essentially done by Miss Lynn Draker and some other paralegal personnel in our office. The one hundred twelve hours at $80.00 an hour I feel represents a fair and reasonable attorney fee in this case, based upon the novelty of the exhibits and the difficulty in preparing the case and I might add that there were a number of potential class members which were contacted by our office that either [281] chose not to participate in this particular hearing but that did consume a

great deal of time in our office in terms of talking with the people and advising them about rights and exploring with them the possibility of entering into this particular hearing. That is all of the testimony I would like to give.

THE COURT: Do you have separated here the paralegal work?

MR. COLLINS: Yes, I have, Your Honor. I have indicated that for example, down at the bottom on Page 2 there, that indicates that was paralegal time that was involved and various other entries and most of the paralegal time was involved in keeping up with the witnesses and also in answering Mr. Nunnally's rather extensive interrogatories which are filed on each of the class participants.

THE COURT: Have you separated it as far as the time per hour?

MR. COLLINS: Yes, Your Honor, I have. At the very end I have indicated there were forty-five hours of paralegal time at $20.00 an hour, which in my judgment is near the going rate in Dallas County or below the going rate for that kind of work.

THE COURT: All right. As far as I am concerned.

* * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Title Omitted in Printing]

ORDER, COMPUTATIONS

PLAINTIFF: Castillo, Jose R.

APPLICATION DATE: 7-16-73

OPERATIVE PERIOD: 10-16-73 through 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
10-16-73 to 7-15-74	(9) nine months	$900/month	$8,100.00
7-16-74 to 7-15-75	(12) twelve mos.	$1008/month	$12,0[illegible].00
7-16-75 to 7-15-76	(12) twelve mos.	*P./1162.22 D./1084.00 (per month	*13,477.32
7-16-76 to 10-20-76	(3) three mos. & (3) days,	*P./1478.34 1171.00	* 4,154.16
		Total	*$37,827.48

* - The figures accompanied by an * asterisk represent an average of the figures presented in plaintiff's exhibit 1 and defendant's exhibit 51.

ACTUAL EARNINGS **

DATE	TIME (IN MONTHS)	RATE (PER MONTH)	AMOUNT
10-16-73 to 6-15-74	(8) months	$673.00	$5,384.00
6-16-74 to 6-30-74	(1/2) month	673.00	336.50
7-1-74 to 8-31-74	(2) months	696.00	1,392.00
9-1-74 to 1-31-75	(5) months	719.00	3,595.00
2-1-75 to 8-31-75	(7) months	812.00	5,684.00
9-1-75 to 8-31-76	(12) months	848.00	10,176.00
9-1-76 to 9-30-76	(1) month	906.00	906.00
10-1-76 to 10-20-76	(2/3) month	906.00	603.94
		Total	$28,077.44
	Estimated	Earnings	$37,827.48
(less)	Actual	Earnings	$28,077.44
=	Damages		$ 9,750.04

** Data derived from Defendant's Exhibit (2) two.

PLAINTIFF: Cerda, Maria

APPLICATION DATE: 8-14-74

OPERATIVE PERIOD: 11-14-74 to 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
11-14-74 to 1-14-75	2 months	$452.40/mos	$ 904.80
1-15-75 to 2-14-75	1 month	$2.69/hr.	465.91
2-15-75 to 7-14-75	5 months	$2.78/hr.	2409.33
7-15-75 to 8-14-75	1 month	$2.88	498.82
8-15-75 to 1-14-76	5 months	$2.97	2574.00
1-15-76 to 2-14-76	1 month	$3.06	529.99
2-15-76 to 6-14-76	4 months	$3.16	2189.25
6-15-76 to 8-14-76	2 months	$3.26	1129.26
8-15-76 to 10-14-76	2 months	$3.36	1164.80
10-15-76 to 10-20-76	4 days	$3.36	107.52
		Total	$11,973.68

PLAINTIFF: Cerda, Maria (continued)

ACTUAL EARNINGS *

DATE		TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
11-14-74	to 12-31-74	34	$3.00	$ 816.00
1-1-75	to 3-16-75	53	$3.00	1,272.00
3-17-75	to 8-3-75	100	$3.15	2,520.00
8-4-75	to 12-7-75	90	$3.25	2,340.00
12-8-75	to 3-28-76	80	$3.45	2,208.00
3-29-76	to 9-12-76	120	$3.60	3,456.00
9-13-76	to 10-20-76	28	$3.70	828.80

Total Actual Earnings $12,983.60

	ESTIMATED EARNINGS	$11,973.68
(less)	ACTUAL EARNINGS	$12,983.60
=	DAMAGES	- $ 1,009.92

* - 1974,1975,&1976 Actual Earnings computed on the basis of data provided in Defendant's Exhibit 4 (Earnings of Miss Cerda while employed at the Drawing Board). Computation in this manner provided a more accurate earnings record than the one provided by Plaintiff in Plaintiff's Exhibit 2 at p. 2.

PLAINTIFF: Esquivel, Pedro Juan

APPLICATION DATE: 10-6-75

OPERATIVE PERIOD: 1-6-76 to 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
1-6-76 to 1-10-76	4	$3.32	$ 106.24
1-11-76 to 6-26-76	120	3.43	3292.80
6-27-76 to 7-5-76	6	3.55	170.40
7-6-76 to 10-20-76	78	3.73	2327.52
		Total	$5,896.96

ACTUAL EARNINGS

1-6-76 to 10-20-76 *

$3,073.95 x .785156 = ...Total..... $2,413.53

	ESTIMATED	EARNINGS	$5,896.96
(less)	ACTUAL	EARNINGS	$2,413.53
=	DAMAGES		$3,483.43

* - 1976 Actual Earnings computed by ascertaining the total number of workdays in 1976 and the total number of workdays in the operative period; calculating % of workdays worked; and multiplying said % by actual earnings listed at Plaintiff's Exhibit 3 and Defendant's Exhibit 54 at p.2.

PLAINTIFF: Flores, Armilda

APPLICATION DATE: 6-26-74

OPERATIVE PERIOD: 6-26-74 through 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
6-26-74 to 12-26-74	6 months	$2.61	$2714.40
12-27-74 to 1-11-75	11	2.69	236.72
1-12-75 to 4-30-75	78	2.78	1734.72
5-1-75 to 10-1-75	109	See Below*	840.13
10-2-75 to 12-26-75	62	2.97	1473.12
12-27-75 to 1-10-76	10	3.06	244.80
1-11-76 to 6-26-76	120	3.16	3033.60
6-27-76 to 10-20-76	84	3.36	2257.92
		TOTAL	$12,535.41

* The Court determined that Ms. Flores should receive 1/3 of her normal rate of pay during her absence from the area. Therefore, the period from 5-1-75 to 10-1-75 must be broken down into the component pay periods to account for existing pay differentials.

5-1-75 to 6-25-75	40	2.78	$889.60
6-26-75 to 7-12-75	12	2.88	276.48
7-13-75 to 10-1-75	57	2.97	1354.32
			$2520.40

1/3 of $2520.40 = ... $ 840.13

PLAINTIFF: Flores, Armilda (continued)

ACTUAL EARNINGS

1974* $1,750.00

1975**..... $4,376.07

1976***.....

4,884,64 x .80228..... $3,918.86

ACTUAL EARNINGS =..... $10,044.93

* Data derived from Plaintiff's Exhibit 4 and Defendant's Exhibit 55.

** Same as *

*** 1976 Actual Earnings computed by ascertaing total number of workdays in 1976 and number of workdays in operative period; calculating % of workdays worked, and multiplying said % by actual earnings listed at Plaintiff's Exhibit 4 at p.2 and Defendant's Exhibit 55.

	ESTIMATED EARNINGS	$12,535.41
(less)	ACTUAL EARNINGS	$10,044.93
=	DAMAGES	$ 2,490.48

PLAINTIFF: Garcia, Gloria

APPLICATION DATE: 10-15-74

OPERATIVE PERIOD: 1-15-75 through 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT	Part-Time Adjustment
1-15-75 to 7-12-75	128	$2.69	$2754.56	$1377.28
7-13-75 to 7-14-75	1	2.80	22.40	11.20
7-15-75 to 1-10-76	129	2.80	2972.16	1486.08
1-11-76 to 1-14-76	3	2.97	71.28	35.64
1-15-76 to 6-26-76	117	3.06	2864.16	1432.08
6-27-76 to 7-14-76	13	3.16	328.64	164.32
7-15-76 to 10-20-76	71	3.26	1851.68	925.84
		Total Estimated Part-Time Wages at Irving Facility		$5,432.44

ACTUAL EARNINGS

1-15-75 to 12-31-75 * $2,350.10 x .96197 =		$2,260.73
1-1-76 to 10-20-76 * $3,934.01 x .80228 =		$3,156.18
	Total	$5,416.91
	ESTIMATED EARNINGS	$5,432.44
(less)	ACTUAL EARNINGS	$5,416.91
=	DAMAGES	$ 15.53

* - 1975 & 1976 Actual Earnings computed by ascertaining the total number of workdays in respective year and the total number of workdays in each operative period; calculating % of workdays worked; and multiplying said % by actual earnings listed at Plaintiff's Exhibit 5 at p. 2 and Defendant's Exhibit 56 at p.2.

PLAINTIFF: Garza, Diana

APPLICATION DATE: 8-14-74

OPERATIVE PERIOD: 11-14-74 through 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
11-14-74 to 1-11-75	42	$2.61	$ 876.96
1-12-75 to 5-13-75	87	2.69	1872.24
5-14-75 to 7-12-75	48	2.78	956.32
7-13-75 to 11-13-75	89	2.88	2050.56
11-14-75 to 1-10-76	40	2.97	950.40
1-11-76 to 5-13-76	89	3.06	2178.72
5-14-76 to 6-26-76	31	3.16	783.68
6-27-76 to 10-20-76	84	3.26	2190.72
		Total	$11,859.60

ACTUAL EARNINGS

1974 *

$2,880.00 x .34 = ... $ 639.20

1975 **

..... $1,989.85

..... $2,375.48

1976 *

$5,105.66 x .80228= $4,096.18

$9,100.71

	Estimated Earnings	$11,859.60
(less)	Actual Earnings	$ 9,100.71
=	Damages	$ 2,758.89

* - 1974 & 1976 Actual Earnings computed by ascertaining total number of workdays in respective year and the number of workdays in operative period; calculating % of workdays worked, and multiplying said % by actual earnings listed at Plaintiff's Exhibit 6 at p.2 (note as for 1974 Actual Earnings, were computed from Defendant's Exhibit 57 at p.2 and % was calculated on the basis of a total workyear beginning on 8-14-74 rather than 1-1-74.

**-1975 data taken from Plaintiff's Exhibit 6, and Defendant's Exhibit 57.

PLAINTIFF: Guzman, Aniceto Diaz

APPLICATION DATE: 9-16-74 (not able to work for D. until 12-74)

OPERATIVE PERIOD: 12-1-74 through 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
12-1-74 to 1-11-75	30	$3.20	$ 768.00
1-12-75 to 5-30-75	100	3.27	2616.00
6-1-75 to 7-12-75	30	3.42	820.80
7-13-75 to 11-30-75	100	3.49	2792.00
12-1-75 to 1-10-76	30	3.77	880.80
1-11-76 to 5-31-76	101	3.79	3062.32
6-1-76 to 6-26-76	19	3.98	604.96
6-27-76 to 10-20-76	84	4.12	2768.64
		Total	$14313.52

Guzman, Aniceto Dil. (Continued)

OVERTIME **** Ees D/X/31

	Overtime		Rate		% of Period	=	Amount
1974	67.6 (hrs.)	x	$3.20	x 1.5 x	.08333	=	$ 27.04

1975 261 Workdays in 1975
1-1-75 to 1-11-75=8 Workdays = 3.065% of Period

(1)	350.7	x	$3.20	x 1.5 x	.03065	=	51.60

1-12-75 to 5-30-75=100 Workdays = 38.314% of Period

(2)	350.7	x	$3.27	x 1.5 x	.38314	=	659.07

6-1-75 to 7-12-75= 30 Workdays = 11.494% of Period

(3)	350.7	x	$3.42	x 1.5 x	.11494	=	206.79

7-13-75 to 11-30-75 = 100 Workdays = 38.314% of Period

(4)	350.7	x	$3.49	x 1.5 x	.38314	=	703.41

12-1-75 to 12-31-75 = 23 Workdays = 8.812% of Period

(5)	350.7	x	$3.67	x 1.5 x	.08812	=	170.12

1976 263 Workdays in 1976; From 1-1-76 to 10-20-76
= 211 Workdays or 80.228% Of Period
.80228 x 315.1 (hrs) = 252.8 hrs. of overtime

1-1-76 to 1-10-76 = 7 Workdays = 3.318% of Period

(1)	252.8	x	$3.67	x 1.5 x	.0318	=	44.26

1-11-76 to 5-31-76 = 101 Workdays = 47.867% of Period

(2)	252.8	x	$3.79	x 1.5 x	.47867	=	687.93

6-1-76 to 6-26-76 = 19 Workdays = 9.00% of Period

(3)	252.8	x	$3.98	x 1.5 x	.09	=	135.83

6-27-76 to 10-20-76 = 84 Workdays = 39.81% of Period

(4)	252.8	x	$4.12	x 1.5 x	.3981	=	621.95

Estimated Overtime $3308.00

(plus) Est. Earnings 14313.52

= Estimated Earnings with Overtime $17,621.52

**** - Overtime calculations based upon data presented in Defendant's Exhibit 31.

Plaintiff: Guzman, Aniceto Diaz (continued)

ACTUAL EARNINGS (includes overtime)

1974 *

12-1-74 to 12-31-74

$5890.51 x (1/12 or .083333) =..... $ 490.87

1975 **

1-1-75 to 12-31-75 =.....$ 7,941.65

1976 *

1-1-76 to 10-20-76

$8,596.56 x .80228 =.....$ 6,896.84

	Total	$15,329.36
	ESTIMATED EARNINGS	$17,621.52
(less)	ACTUAL EARNINGS	$15,329.36
=	DAMAGES	$ 2,292.15

* - 1974 & 1976 ACTUAL EARNINGS calculated by ascertaining total number of workdays for each respective year and the number of workdays during each respective operative period; calculating % of workdays worked, and multiplying said % by actual earnings listed at Plaintiff's Exhibit 7 and Defendant's Exhibit 58, & Defendant's Exhibit 3/

** - 1975 Actual Earnings determined from Plaintiff's Exhibit 7 at p. 2 and Defendant's Exhibit 58 at p. 2.

PLAINTIFF: Lyshol, Martha

APPLICATION DATE: 10-8-75

OPERATIVE PERIOD: 10-9-75 through 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
10-9-75 to 1-10-76	67	$2.80	$ 1,500.80
1-11-76 to 4-9-76	65	2.89	1,502.80
4-10-76 to 6-26-76	55	2.97	1,306.80
6-27-76 to 10-9-76	75	3.07	1,842.00
10-10-76 to 10-20-76	8	3.16	202.24
		Total	$6,354.64

ACTUAL EARNINGS *

10-9-75 to 12-31-75			$1,034.26
1-1-76 to 10-20-76 **			
$6,758.94 x .80228	=		$5,422.32
		Total	$6,456.58

	Estimated	Earnings	$6,354.64
(less)	Actual	Earnings	$6,456.58
=	Damages		$ -101.94

* - Data derived from Plaintiff's Exhibit 10 & Defendant's Exhibit 62

** - 1976 Actual Earnings computed by ascertaining total # of workdays in 1976 and # of workdays in operative period; calculating % of workdays worked, and multiplying said % by actual earnings listed at Plaintiff's Exhibit 10 p.2.

PLAINTIFF: Ortiz, Hermalinda

APPLICATION DATE: 3-19-74

OPERATIVE PERIOD: 3-20-74 through 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
3-20-74 to 6-22-74	68	$2.36	$1,283.84
6-23-74 to 9-19-74	64	2.61	1,336.32
9-20-74 to 1-11-75	81	2.69	1,743.12
1-12-75 to 3-19-75	48	2.78	1,067.52
3-20-75 to 7-12-75	82	2.88	1,889.28
7-13-75 to 9-19-75	50	2.97	1,188.00
9-20-75 to 1-10-76	80	3.06	1,958.40
1-11-76 to 3-19-76	50	3.16	1,264.00
3-20-76 to 6-26-76	70	3.25	1,820.00
6-27-76 to 10-20-76	84	3.36	2,257.92
		Total	$15,808.40

ACTUAL EARNINGS

1974 *	.....	.....	.$1,184.00
1975 **	.....	.....	.$6,857.35
1976 (to 10-20-76)*** $5,476.11 x .80228 =...	.....	.....	.$4,393.37
		Total	$12,434.72
	ESTIMATED	EARNINGS	$15,808.40
(less)	ACTUAL	EARNINGS	$12,434.72
=	DAMAGES		$ 3,373.68

* - 1974 Actual Earnings derived from Defendant's Exhibit 64 at p.2.

** 1975 Actual Earnings derived from Plaintiff's Exhibit 12 at p.2 & Defendant's Exhibit 64 at p.2.

PLAINTIFF: Ortiz, Hermalinda (continued)

*** - 1976 Actual Earnings computed by ascertaining the total number of workdays in 1976 and the number of workdays in the operative period; calculating the % of workdays worked and multiplying said % by Actual Earnings listed at Plaintiff's Exhibit 12 at p.2 & Defendant's Exhibit 64 at p.2.

PLAINTIFF: Lopez, Robert Alfred

APPLICATION DATE: 7-24-74

OPERATIVE PERIOD: 10-24-74 through 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
10-24-74 to 1-11-75	79	$3.11	$ 1,965.52 (Grp.4
1-12-75 to 4-23-75	72	3.16	1,845.44 (Grp.4
4-24-75 to 7-12-75	57	3.74	1,705.44 (Grp.1
7-13-75 to 10-23-75	74	3.87	2,291.04 "
10-24-75 to 1-10-76	56	4.08	1,827.84 "
1-11-76 to 4-23-76	75	4.21	2,526.00 "
4-24-76 to 6-26-76	45	4.44	1,598.40 "
6-27-76 to 10-20-76	84	4.62	3,104.64 "
		Total	$16,864.32

ACTUAL EARNINGS

10-24-74 to 12-31-74 * $3,096.15 x .61739 =	$1,911.53
1-1-75 to 12-31-75 *†	$7,000.00
1-1-76 to 10-20-76 * $7,000.00 x .80228	$5,615.96
Additional adjustment to income attributable to use of apartment during employment	$1,500.00
Total	$16,027.49

	ESTIMATED EARNINGS	$16,864.32
(less)	ACTUAL EARNINGS	$16,027.49
=	DAMAGES	$ 836.83

PLAINTIFF: Lopez, Robert Alfred (continued)

* - 1974 & 1976 Actual Earnings computed by ascertaining the total number of workdays in respective year (for 1974 the year was considered to have begun on date of application) and the number of workdays in the respective operative periods; calculating % of workdays worked, and multiplying said % by actual earnings listed at Plaintiff's Exhibit 9 at p.2.

** - 1975 Actual Earnings derived from Plaintiff's Exhibit 9 at p.2.

PLAINTIFF: Longoria, Juan J.

APPLICATION DATE: 4-30-73

OPERATIVE PERIOD: 8-23-73 through 10-20-76 (from date of Falcon's Complaint

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
8-23-73 to 2-22-74	132	$3.03	$3,199.68
2-23-74 to 6-22-74	85	3.13	2,128.40
6-23-74 to 8-22-74	44	3.20	1,126.40
8-23-74 to 1-11-75	101	3.53	2,852.24
1-12-75 to 2-22-75	30	3.60	864.00
2-23-75 to 7-12-75	100	3.78	3,024.00
7-13-75 to 8-22-75	30	3.86	926.40
8-23-75 to 1-10-76	100	4.06	3,248.00
1-11-76 to 2-22-76	30	4.19	1,005.60
2-23-76 to 6-26-76	90	4.41	3,175.20
6-27-76 to 8-22-76	40	4.56	1,459.20
8-23-76 to 10-20-76	44	4.80	1,689.60
		Total	$24,698.72

ACTUAL EARNINGS

1973* (8-23-73 to 12-31-73) $4,676.53 x .53409 =	$2,497.69
1974**	$10,327.37
1975**	$11,480.11
1976* (1-1-76 to 10-20-76) $11,830.31 x .80226=	$ 9,491.22
Total	$33,796.39

	ESTIMATED	EARNINGS	$24,698.72
(less)	ACTUAL	EARNINGS	$33,796.39
=	DAMAGES		-$ 9,097.67

Longoria, Juan J. (cont'd)

* - 1973 & 1976 Actual Earnings computed by ascertaining the total number of workdays in the respective years and the number of workdays in the respective operative periods; calculating the % of workdays worked and multiplying said % by the Actual Earnings listed at Plaintiff's Exhibit 8 and Defendant's Exhibit 60.

** 74 & 1975 Actual Earnings derived from Plaintiff's Exhibit 8 at p.2 and Defendant's Exhibit 60 at p.2.

PLAINTIFF: Sanchez, Ramon S.

APPLICATION DATE: 6-21-74 (available 7-1-74)

OPERATIVE PERIOD: 9-21-74 to 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
9-21-74 to 1-11-75	80	$2.55	$1,632.00
1-12-75 to 3-20-75	49	2.63	1,030.96
3-21-75 to 7-12-75	81	2.72	1,448.96
7-13-75 to 9-20-75	64	2.83	1,448.96
9-21-75 to 1-10-76	79	2.94	1,858.08
1-11-76 to 3-20-76	50	3.03	1,212.00
3-21-76 to 6-26-76	70	3.15	1,764.00
6-27-76 to 9-20-76	61	3.26	1,590.88
9-21-76 to 10-20-76	23	3.39	623.76
		Total	$12,923.20

ACTUAL EARNINGS

1974 $1,288 x .521739 =	$ 671.99
1975**	2,392.00
1976* $1,104 x .80228 =	885.72
Eleven months of unemployment insurance from 2-75 to 12-75 at $63.00 per month =	3,003.00
Total	$6,952.71

	ESTIMATED EARNINGS	$12,923.20
(less)	ACTUAL EARNINGS	6,952.71
=	DAMAGES	$5,970.49

PLAINTIFF: Marcs, Steven

APPLICATION DATE: 7-23-76

OPERATIVE PERIOD: 7-24-76 to 10-20-76

ESTIMATED EARNINGS

DATE	TIME (WORK DAYS)	RATE (PER HOUR)	AMOUNT
7-24-75 to 10-20-76	64	$3.71	$1,899.52
Estimated overtime for the period of 7-24-76 to 8-6-76	10	5.565	445.20
		Total	$2,344.72

ACTUAL EARNINGS *

7-24-76 to 8-6-76			$ 440.00
7-24-76 to 8-6-76			300.00
8-9-76 to 9-8-76			600.00
9-9-76 to 10-8-76			600.00
10-9-76 to 10-20-76			218.16
		Total	$2,158.16

	Estimated	Earnings	$2,344.72
(less)	Actual	Earnings	$2,158.16
=	Damages		$ 186.56

* - Actual Earnings derived from testimony presented in "phase II" trial.

PLAINTIFF: FALCON, MARIANO

OPERATIVE PERIOD: 10-8-72 to 10-20-76

POTENTIAL EARNINGS

DATE	AMOUNT
10-8-72 to 4-1-73	$4, 040.00
4-2-73 to 6-17-73	1, 892.00
6-18-73 to 10-1-73	3, 078.00
10-2-73 to 6-30-74	8, 517.60
7-1-74 to 8-3-75	13, 452.00
8-4-75 to 8-1-76	13, 270.40
8-2-76 to 10-20-76	3, 086.72
Total Potential Earnings	$47, 336.72

ACTUAL EARNINGS HAD FALCON ACCEPTED POSITION AS INSTALLER REPAIRMAN

10-8-72 to 12-31-75	$34, 214.10
1-1-72 to 10-20-76	12, 082.39
Total actual earnings had Mr. Falcon accepted position as Installer Repairman	$46, 296.49
Potential earning	$47, 336.72
Actual earnings	46, 296.49
Damages	$1, 040.33

PLAINTIFF	BACK PAY AWARD	JOB SECURITY AWARD	SUBTOTAL	INTEREST (6%) (10-20-76 to 10-19-77)	INTEREST & FINAL AWARD (10-20-77 to 10-19-78)
CASTILLO, J.	$9,750.04	$300.00	$10,050.04	$10,653.04	$11,292.22
CERDA, M.	-$1,009.92	$300.00	-$ 709.92	---	---
ESCUIVEL, P.	$3,483.43	$300.00	$ 3,783.43	$ 4,010.44	$ 4,251.07
FLORES, A.	$2,490.48	$300.00	$ 2,790.48	$ 2,957.90	$ 3,135.38
GARCIA, G.	$ 15.53	$300.00	$ 315.53	$ 334.46	$ 354.53
JUMAN, A.	$2,292.15	---	$ 2,292.15	$ 2,429.68	$ 2,575.46
LONGORIA, J.	-$9,097.67	$300.00	-$ 8,797.67	---	---
LOPEZ, R.	$ 836.83	$300.00	$ 1,136.83	$ 1,205.04	$ 1,277.34
LYSHOL, M.	-$ 101.94	$300.00	$ 198.06	$ 209.94	$ 222.54
MARES, S.	$ 186.56	---	$ 186.56	$ 197.75	$ 209.62
ORTIZ, H.	$3,373.68	$300.00	$ 3,673.68	$ 3,894.10	$ 4,127.75
FALCON, M.	$1,040.23	---	$ 1,040.23	$ 1,103.39	$ 1,169.59
REA, D.	$2,758.89	$300.00	$ 3,058.89	$ 3,242.42	$ 3,436.97
SANCHEZ, R.	$5,970.49	$300.00	$ 6,270.49	$ 6,646.72	$ 7,045.52
					$19,027.99

Signed and Entered this the 20th day of October, 1978.

/s/ Sarah T. Hughes
United States District Judge

[Filed October 20, 1978]

SUPREME COURT OF THE UNITED STATES

No. 80-1264

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. — (1981).

IT IS FURTHER ORDERED that the petitioner, General Telephone Company of the Southwest, recover from Mariano S. Falcon Two Hundred Dollars ($200.00) for its costs herein expended.

April 6, 1981

Clerk's costs: $200.00

Opposition

Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS
CLERK

No. 81-574

IN THE

Supreme Court of the United States

October Term, 1981

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

FRANK P. HERNANDEZ
Hernandez, Inc.
2025 Cedar Springs
Dallas, Texas 75201

JOHN E. COLLINS
P. O. Box 5024
2121 W. Airport Freeway,
#445
Irving, Texas 75062
(214) 258-1177

(Counsel of Record)

QUESTION PRESENTED

RESPONDENT WOULD STATE THE ISSUE AS FOLLOWS:

> WHETHER "ACROSS THE BOARD" ATTACKS IN TITLE VII CASES ARE STILL ALLOWED AFTER THIS COURT'S DECISION IN *EAST TEXAS MOTOR FREIGHT SYSTEMS, INC. V. RODRIGUEZ*, 431 U.S. 395 (1977).

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No. 81-574

IN THE

Supreme Court of the United States

October Term, 1981

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, MARIANO S. FALCON, individually and as class representative, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case, reported at 626 F.2d 369 (5th Cir. 1980), and its orders vacating portions of its prior decision.

STATEMENT OF THE CASE

Respondent is dissatisfied with Petitioner's "statement" as it omits material findings and conclusions made by the trial court.

At the conclusion of the phase I (liability) portion of the case, the trial judge on March 22, 1977, specifically found that Mariano S. Falcon "fairly and adequately" represents Mexican-Americans now employed and those who have applied for employment at General Telephone's Irving facility (see p. 40a, Appendix, General Telephone's Petition)

Previously, General Telephone was informed by the trial court that it could raise the "... issue of this provisionally-certified class during or after the presentation of the class claims and evidence at trial." (See p. 51a, Appendix, General Telephone's Petition).

The trial court on at least two separate occasions carefully considered the class certification issues prior to actually trying the liability portion of the case. (See pp. 48a, 50a, Appendices, General Telephone's Petition).

REASONS FOR DENYING THE WRIT

I. *EAST TEXAS MOTOR FREIGHT SYSTEMS, INC. V. RODRIGUEZ* DOES NOT PROHIBIT TITLE VII "ACROSS THE BOARD" ATTACKS ON DISCRIMINATORY EMPLOYMENT PRACTICES.

Unless this Court wishes to abolish "across the board" attacks in Title VII cases there is no need to grant the writ. There simply is no language in *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395 (1977), that says broad attacks in racial discrimi-

nation cases are outlawed, or even outmoded. Regardless of Petitioner's unclear position,[1] there is no conflict between the Fifth Circuit opinion in *Falcon* and *East Texas Motor Freight Systems, Inc. v. Rodriguez, supra.* This Court's opinion in *Rodriguez* did not prohibit "across the board" class action in Title VII cases. Rather this Court held in *Rodriguez* that "a class representative must be part of the class and 'possess the same interest and suffer the same injuries' as the class members." *Id.* at 403. This conclusion was reached since the class representatives were found by the trial court and the court of appeals not to have suffered an injury as a result of alleged discriminatory practices.

Unlike *Rodriguez, Falcon* has suffered an injury as a result of unlawful employment discrimination. The Fifth Circuit correctly found that there was a sufficient nexus between the Plaintiff's claims and those of the class to satisfy the requirement of Rule 23 and, that such a finding (to allow a Plaintiff to represent a class suffering from a common discriminatory complaint) was consistent with the holding in *Rodriguez* and the policy of Title VII. 626 F.2d at 375.

Petitioner's argument that the Fifth Circuit's decision in *Falcon* conflicts with this Court's holding

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[1] Petitioner argues that *Rodriguez* "* * * precludes the continued use of the across the board approach to class actions." (Petition, p. 8) And, near the end of its Petition says: "Finally, petitioner is not asking that this court end broad-based class actions in employment discrimination cases." (Petition, p. 20)

in *Rodriguez* is tantamount to arguing that *Rodriguez* mandates an automatic rule that a victim of a policy of discrimination by an employer cannot represent other victims of the same policy unless their positions and specific injuries are identical. Such a result would allow Rule 23 requirements to defeat the policy behind Title VII, a result not present in the *Rodriguez* decision.

Since *Rodriguez,* the Fifth Circut has addressed the issue of "across the board" attacks in a manner consistent with Title VII policy and the holding in *Rodriguez. Satterwhite v. City of Greenville,* 578 F.2d 987 (5th Cir. 1978), *vacated and remanded on other grounds,* 445 U.S. 940 (1980); and, *Payne v. Travenol Laboratories, Inc.,* 565 F.2d 895 (5th Cir.) *cert. denied* 439 U.S. 835 (1978). In *Satterwhite, supra,* the Fifth Circuit made the same distinction that was made in *Falcon* in holding that *Rodriguez* involved named plaintiffs who lacked a nexus with the class as a result of the lack of merit of their individual claims and the *Rodriguez* opinion was not contrary to the policy favoring "across the board" Title VII class actions. *Satterwhite, supra,* at 993 n.8. In *Payne v. Travenol, Inc., supra at* 900, the Fifth Circut specifically addressed the issue raised by the Petitioner and held that,

> "Plaintiffs' action is an 'across the board' attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of these discriminatory practices, plaintiffs have

> demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies."

This policy was most recently affirmed by the Fifth Circuit in *Phillips v. Joint Legislative Committee on Performance & Expenditure Review*, 637 F.2d 1014, 1024 (5th Cir. 1981).

The policy behind these decisions is mandated by the purpose of Title VII. Rule 23 must not be read in a vacuum, but rather, against the nature and purpose of the substantive law of plaintiff's claim. *Quigley v. Braniff Airways, Inc.*, 85 F.R.D. 74 (N.D. Tex. 1979). "Congress intended Title VII to be a broad, remedial measure aimed at eliminating the widespread discriminatory employment conditions that have a destructive impact not only on those 'forced into a condition of marginal existence' but also on the nation as a whole deprived of the talents of the victims of discrimination." *Quigley, supra* at 78, citing [1964] U.S. Code Cong. & Admin. News, pp. 2355, 2514; see *Id.* at 2525, 2516; H.R. Rep. No. 914; *Id.* at 2393; S. Rep. No. 872; *Id.* at 2377. See also, *Cooper v. University of Texas at Dallas*, 482 F.Supp. 187, 192 (N.D. Tex. 1979), and *Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420, 432-33 (N.D. Tex. 1979).

Due to Title VII's purpose, Rule 23 standards must be given sufficient breadth to carry out congressional goals. The Fifth Circuit's opinion in *Falcon* allows this breadth in view of the particular

facts of the case. This is not in conflict with *Rodriguez* and to hold otherwise would forbid "across the board" attacks against discriminatory employment practices with the practical result of defeating class actions under Title VII in most circumstances, regardless of the facts.

General Telephone argues that a ". . . clear *potential* conflict" exists between Falcon and the hiring class (p. 15-16 Petition) since Falcon presented only statistical evidence to the trial court in conjunction with the hiring discrimination claims. General Telephone naturally does not describe what other kinds of evidence could have been presented on the hiring claims. Falcon respectfully suggests that the statistical evidence presented is about all that could have been presented on the hiring claims, short of an actual courtroom confession by General Telephone that indeed it did discriminate against Mexican-American applicants.

To allow hypothetical conflicts (such as those conjured up by General Telephone in this case) to prohibit "across the board" attacks in Title VII cases would do great harm to the express congressional intent of mitigating the effects of discriminatory employment practices.

II. THE FIFTH CIRCUIT'S HOLDING IN *FALCON* DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *GENERAL TELEPHONE COMPANY OF THE NORTHWEST* OR WITH THE THIRD CIRCUIT'S DECISION IN *SCOTT V. UNIVERSITY OF DELAWARE.*

After a careful review of the trial court evidence the Fifth Circuit concluded (as did the trial court) that Falcon adequately represented the class with respect to both hiring and promotional discrimination claims. A sufficient nexus was demonstrated between his claim of promotional discrimination and the other class members' claims of hiring discrimination. Falcon and the class members suffered from the same injury, namely, employment discrimination because of national origin.

The Fifth Circuit's holding in *Falcon* does not conflict with decisions of this Court or those of other Courts of Appeals. In *General Telephone Company of the Northwest v. Equal Employment Opportunity Commission,* 100 S.Ct. 1698 (1980) this Court was not concerned with "across the board" attacks or their use in employment discrimination cases. Rather, in very explicit language, this Court ruled that the EEOC may maintain a Title VII enforcement action without first obtaining class certification pursuant to Rule 23. 100 S.Ct. at 1708.

In passing on this issue, in dicta, this Court did observe several problem areas in dealing with Rule 23. It was noted that conflicts *might* arise between

employees and applicants if they are competing for fringe benefits or seniority, 100 S.Ct. at 1707. Under those circumstances the same plaintiff *might* not be able to represent different classes. The mere observation about problems that conceivably could arise in Title VII class litigation fails to rise to the status of a "conflict" with the Fifth Circuit's decision in this case. There simply is no conflict between *Falcon* and *General Telephone Company of the Northwest.*

Likewise, *Scott v. University of Delaware,* 601 F.2d 76 (3rd Cir.) *cert. denied,* 444 U.S. 93 (1979) raises no conflict with *Falcon* since a concurring opinion clearly said, 601 F.2d at 92, that the ruling in that case was not intended to represent a constriction upon the availability of the class action device in suits charging "across the board" discriminatory employment practices.[3] In *Scott* there was a clear conflict on the part of the class representative which simply did not arise in the instant case. The Fifth Circuit observed that Falcon showed more than an alliance based simply on the same type of discriminatory claim. "He also showed a similarity of interests based on job location, job function and other considerations." 626 F.2d 369, 375-376.

Petitioner's analysis of the issues simply fails to

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[3] General Telephone (p. 14, Petition) conveniently overlooked that portion of the *Scott* decision. In fact, one of the commentators on which Petitioner relied heavily (pp. 8, 9, 17, 20, Petition) cites *Scott* as authority for a liberal certification trend even after Rodriguez! Rutherglen, Title VII Class Actions, 47 U.Chi.L.Rev. 688, 723, n. 210 (1980).

explain how *General Telephone Company of the Northwest* and *Scott v. University of Delaware* conflict with Falcon's theory of an "across the board" attack. Respondent submits the writ should be denied because there is no substantial conflict that would warrant this court's attention.

CONCLUSION

Petitioner has presented no basis for asserting a conflict between this Court's decision and the Fifth Circuit's holding in the instant case. The petition should be denied.

Respectfully submitted,

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Petitioner's Brief

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OCTOBER TERM, 1981

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Must one seeking to bring an "across the board" class action do more to satisfy rule 23(a) of the Federal Rules of Civil Procedure than allege that he and the class members are Mexican-Americans and that each suffered some form of injury from an employer's policy of discrimination against Mexican-Americans?

2. Must a putative class representative who complains of discrimination in promotions and who seeks to represent unsuccessful applicants show that there will be no conflicting interests and that establishing his personal claim will at least partially establish the class claims?

PARTIES IN THE COURT OF APPEALS

General Telephone Company of the Southwest*

Mariano S. Falcon

All Mexican-Americans who were employed by or who sought employment with General Telephone Company of the Southwest at its Irving, Texas location.

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* General Telephone Company of the Southwest has no subsidiaries. The parent company of General Telephone Company of the Southwest is General Telephone and Electronics Corporation. The following list consists of the significant subsidiaries of the parent company, as defined by the Securities and Exchange Commission, including those that have outstanding publicly held issues of securities in the United States:

GTE Products Corporation of Connecticut; GTE Products Corporation; GTE Automatic Electric Incorporated; GTE Automatic Electric Laboratories Incorporated; GTE Lenkurt Incorporated; GTE Credit Corporation; GTE Finance N.V.; GTE Export Factoring Company B.V.; GTE Laboratories Incorporated; GTE International Incorporated; GTE Telecommunicazioni S.P.A.; GTE Sylvania Canada Limited; GTE ATEA N.V.S.A.; GTE Telenet Incorporated; GTE Telenet Holding Corporation; GTE Telenet Information Services Incorporated; GTE Telenet Systems Incorporated; Anglo-Canadian Telephone Company; British Columbia Telephone Company; AEL Microtel Limited; Canadian Telephones and Supplies Ltd.; Dominion Directory Company Limited; Quebec-Telephone; General Telephone Company of California; General Telephone Company of Florida; General Telephone Company of Illinois; General Telephone Company of Indiana, Inc.; General Telephone Company of Kentucky; General Telephone Company of Michigan; General Telephone Company of the Midwest; General Telephone Company of the Northwest, Inc.; General Telephone Company of Ohio; General Telephone Company of Pennsylvania; General Telephone Company of the Southeast; General Telephone Company of the Southwest; General Telephone Company of Wisconsin; GTE Directories Corporation; Hawaiian Telephone Company; GTE Data Services Incorporated; GTE Investment Management Corporation; GTE Realty Corporation; GTE Satellite Corporation; GTE Service Corporation; GTE Shareholder Services Incorporated; Telect Insurance Company Limited.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-574

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The judgment and findings of fact and conclusions of law by the district court concerning liability were not reported. (PA 34, 46.)* The orders of the district court certifying the class and denying motions for decertification of the class also were not reported. (PA 48-52.) The opinion of the district court with respect to back pay was reported at 463 F. Supp. 315 (N.D. Tex. 1978). (PA 53.) The initial opinion of the United States Court of Appeals for the Fifth Circuit was reported at 626 F.2d 369 (5th Cir. 1980). (PA 4.) The opinion of this Court granting certiorari, vacating the decision of the court of appeals, and remanding the case to the court of appeals for further consideration was reported at 101 S. Ct. 1752 (1981). The opinion of the court of appeals vacating portions of its prior decision and reinstating others was unofficially

* Citations to "PA" are references to the Appendix to the Petition for a Writ of Certiorari filed by General Telephone Company of the Southwest. Citations to "JA" are references to the Joint Appendix.

reported at 25 Fair Empl. Prac. Dec. 1735 (5th Cir. 1981). (PA 1, 3.)

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 29, 1981. (PA 1.) A timely Petition for Rehearing was denied on June 23, 1981. (PA 70.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The due process clause of amendment V of the United States Constitution and rules 23(a) and 23(b) of the Federal Rules of Civil Procedure were set out in the Appendix to the Petition for a Writ of Certiorari filed by General Telephone Company of the Southwest. The text of 42 U.S.C. § 1981 (1976) and Title VII of the Civil Rights Act of 1964, §§ 706(a), 706(b), 706(f)(1), 707(a), and 707(c), 42 U.S.C. §§ 2000e-5(a), -5(b), -5(f)(1), -6(a), and -6(c) (1976 & Supp. III 1979) are set out in the Addendum attached to this Brief.

STATEMENT

Mariano S. Falcon ("Falcon") applied for employment at the Irving, Texas division of General Telephone Company of the Southwest ("General") in July 1969. The Irving facility employed construction workers, technicians, clerical, and administrative employees. As part of General's affirmative action program, Falcon was hired for construction work as a groundsman. He was subsequently promoted to lineman and then to lineman in charge. During 1971 and 1972, Falcon sought and was considered for, along with several others, a promotion to field inspector, a management position in the construction department. He did not receive this promotion, but several non-Mexican-Americans did. Falcon subsequently filed an Equal Employment Opportunity Commission ("EEOC") charge and then a complaint alleging that General's fail-

ure to promote him was the result of a discriminatory policy toward Mexican-Americans and violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—2000e-17 and 42 U.S.C. § 1981.[1] (PA 4-6, 34-37.) Falcon has never alleged at any time that General discriminated against him in hiring. Moreover, at trial he testified that he did not know of a single Mexican-American who had unsuccessfully applied for employment with General. (JA 78.)

Falcon's complaint stated that he was bringing suit pursuant to rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of all Mexican-Americans who are or might be employed by General at its Irving location. The complaint alleged that General had discriminated against these persons, because of their national origin, with regard to compensation, terms, conditions, and privileges of employment. (JA 13-17.)

Before trial, Falcon asked the court to certify a class, with him as its sole representative. The class he sought consisted not only of all Mexican-Americans employed by General but also of all other Mexican-Americans who had applied for employment with General but had not been hired. Falcon did not offer any evidence that he met the requirements of rule 23(a) of the Federal Rules of Civil Procedure with regard to these unsuccessful applicants. Instead, he argued that such evidence was not necessary under the Fifth Circuit's "across the board" approach to employment discrimination class actions. Falcon asserted that in the Fifth Circuit a plaintiff who is a minority group member and an employee of the defendant may in an "across the board" class action present all of the claims of all other employees or applicants for employment with the defendant who are members of the same minority group, regardless of differences in the discrimination al-

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[1] Jurisdiction of the district court was premised on 28 U.S.C. §§ 1343(4), 2201 & 2202 (1976 & Supp. III 1979) and 42 U.S.C. § 2000e-5(f) (1976).

legedly suffered by the individual class members. (JA 40, 44-47.)

The trial court did not hold an evidentiary hearing to determine whether the requirements of rule 23(a) were satisfied. However, it certified a class of Mexican-Americans under rule 23(b)(2), with Falcon as its sole representative, that included unsuccessful applicants. The court did not make findings of fact to support its conclusion that Falcon was an appropriate class representative. (PA 48.)

General objected that Falcon could not meet the requirements of rule 23(a) with regard to the representation of unsuccessful applicants. The Company argued that Falcon had admitted that he had not suffered from hiring discrimination, and asserted that Falcon's interests were different from, and in conflict with, those of unsuccessful applicants. (JA 53-58, 62, 97, 214, 216-218.) Falcon responded that under the across the board approach it was irrelevant that he had not suffered from hiring discrimination, and that in employment discrimination cases courts "have not recognized the appearance of impropriety where an employee seeks to represent the interests of a prospective employee." (JA 63-67.) The trial court denied General's attempts to have the class decertified. (PA 50-52.)

The court divided the trial into liability and remedy stages. At the liability stage, Falcon introduced extensive testimonial and documentary evidence concerning his allegations of discrimination in promotions. The only evidence he introduced pertaining to hiring discrimination, however, consisted of statistical exhibits. These exhibits compared the percentage of Mexican-Americans in the total work force of the surrounding area to the percentage of Mexican-Americans in General's work force at its Irving location. They also set forth, by race and national origin, the numbers of persons hired by General during certain years, but did not compare those numbers to a relevant applicant pool. (PA 25 n.16; Pl. Exhs. 16-21; JA 151-

156; Tr. R. 131.) Falcon did not introduce evidence on the hiring process or attempt to show any similarity between the hiring and the promotion process.[2] In its defense General introduced statistical evidence showing that, within the relevant period, it hired Mexican-Americans at a disproportionately high rate compared to the composition of the local labor force and the applicant flow for the facility involved. (PA 7 n.4, 25 n.16; Def. Exhs. 8-12, Tr. R. 304-314.)

The trial court ruled that General had discriminated against Falcon by not promoting him and had discriminated against the class in hiring, but not in promotions. The court ordered injunctive relief, including the implementation of an affirmative action plan establishing goals for the promotion of Mexican-Americans and increased efforts to recruit Mexican-Americans. (PA 41-45.) At the remedy portion of the trial, the court ordered General to pay back wages to Falcon and to all of the thirteen unsuccessful applicants who had filed claims in response to a notice to the class informing them of their possible right to receive back pay. (PA 53-64; JA 237-259.)

On appeal, the Fifth Circuit affirmed the trial court's class certification decision. It declared that a trial court's failure to hold a certification hearing is not critical unless a class is not certified and the plaintiff is thereby denied "an effective opportunity to litigate" the merits of certification. (PA 10-11.) On the merits of certification, the court of appeals stated that the plaintiff and class suffered from a common discriminatory complaint because all of the claims were based on national origin discrimination. The court declared that although such similarities

> are not dispositive in favor of finding that the prerequisites of Rule 23 have been met, they are an extremely important factor in the determination, that can outweigh the fact that the members of the plain-

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[2] Falcon said in his answers to interrogatories that he would make such information available after discovery (JA 26-27, 34), but he never did.

tiff class may be complaining about somewhat different specific discriminatory practices.

(PA 13.) The appellate court stated that Falcon also "showed a similarity of interests" with the applicant class he sought to represent "based on job location, job function and other considerations." (PA 13.) However, it did not specify what those "other considerations" were and did not limit the class to those seeking the type of outside construction job he had performed.

The court of appeals also affirmed the ruling below that General's failure to promote Falcon was discriminatory, holding that General had failed to rebut Falcon's prima facie case by proving that those non-Mexican Americans promoted after Falcon sought a promotion were "better qualified" than Falcon. (PA 19.) However, because the trial court failed to explain why it had relied on plaintiff's labor force data rather than the applicant flow data submitted by General, the court of appeals did not affirm the finding that General had discriminated in hiring. Instead, it remanded this portion of the case for further consideration of the statistical data introduced by the parties. (PA 23-23.)

General filed a petition in this Court for a writ of certiorari to review the order of the Fifth Circuit remanding the case to the district court. The petition for certiorari raised issues on both the Fifth Circuit's rulings on class certification and its ruling on Falcon's promotion claim.

This Court subsequently granted General's petition, vacated the judgment of the Fifth Circuit, and remanded the case to the Fifth Circuit for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981). *Burdine* concerned proper burdens of proof in disparate treatment cases, but did not address any issues regarding proper class scope.

On remand, the Fifth Circuit vacated only the portion of its prior opinion dealing with Falcon's promotion claims.

The court expressly reinstated all other parts of that opinion, including part I, which had affirmed the district court's class certification on the basis of the across the board approach. (PA 1-3.) Thus, upon remand, the district court would have had only two limited tasks: (1) a reevaluation of Falcon's individual claim of discrimination in promotions under the standards specified by this Court in *Burdine*; and (2) a reevaluation of the statistical evidence pertaining to the hiring claims of the class. By reinstating part I of its prior opinion, the Fifth Circuit barred any reconsideration by the district court of its use of the across the board approach to permit Falcon to represent applicants.

SUMMARY OF ARGUMENT

This case vividly illustrates the Fifth Circuit's presumption that "across the board" class actions are generally appropriate in employment discrimination cases. It also vividly illustrates why that presumption is contrary to rule 23(a) of the Federal Rules of Civil Procedure.

Mariano Falcon, the plaintiff in this case, was certified as the sole representative of a class of Mexican-Americans who had been unsuccessful applicants for employment with General, despite four facts: (1) Falcon himself had not been an unsuccessful applicant; (2) Falcon's personal claim of promotion discrimination was tried on the basis of a different legal theory ("disparate treatment") than the hiring claims of the class ("disparate impact"); (3) the evidence relevant to Falcon's promotion claim was irrelevant to the hiring claims of the class; and (4) there was a conflict of interest between Falcon and the applicant class, because relief for the class would diminish Falcon's chances of getting the promotion he sought.

These facts clearly establish that Falcon could not be an appropriate class representative for unsuccessful applicants. Because Falcon's claim of disparate treatment in promotions was tried on a different legal theory

and on the basis of entirely different evidence than the disparate impact hiring claims of the class, the establishment of his personal claim would not even partially establish the class claims. Since the class claims could not in such circumstances be said to be "fairly encompassed" by Falcon's claim, the typically requirement of rule 23 (a) (3) was not met. *See General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980). Indeed, the claims and defenses applicable to the claims of Falcon and class members were so dissimilar that their trial did not even involve the "common questions of law or fact" required by rule 23(a) (2). Finally, the conflict of interest between Falcon and the hiring class, which gave him an incentive to see that the hiring class did not prevail, rendered Falcon incapable of meeting the adequacy of representation requirement of rule 23(a) (4). *Id.* at 331.

The district court would surely have concluded that Falcon was an inappropriate class representative if it had carefully applied rule 23(a) to the case. Instead, it relied on the Fifth Circuit's "across the board" approach as a surrogate for the requirements of the rule. That approach is wrong. It permits a plaintiff to assert all the claims of a class of all those in the same racial, ethnic, or sexual group who have worked for or applied to an employer, based on an allegation that all have been injured by the employer's "policy" of discrimination against that racial, ethnic, or sexual group. But this Court has warned that a complaint in itself cannot guarantee that the plaintiff will be an adequate class representative and that "careful attention" to the requirements of rule 23(a) is "indispensable." *East Texas Motor Freight System, Inc., v. Rodriguez*, 431 U.S. 395, 405-06 (1977). Moreover, the across the board approach avoids the language and purpose of rule 23(a) by permitting class certification solely on the basis of considerations, such as a common national origin or a bare allegation of a discriminatory policy, that are not in themselves sufficient to satisfy rule 23(a).

This evasion of the requirements of rule 23(a) does not further the policies of Title VII or rule 23. Certifica-

tion of class representatives whose Title VII claims are not typical of those of the class and who are not adequate class representatives unfairly jeopardizes the Title VII rights of absent class members, while unfairly subjecting Title VII defendants to the possibility that class action judgments in their favor will not be given *res judicata* effect. Moreover, the consolidated trial of dissimilar Title VII claims imposes substantial burdens upon both defendants and the court system, without any assurance that the absent class members actually have a grievance that they wish to litigate.

This Court has held that all class suits are to be governed by the provisions of rule 23 except where there is a "clear expression of congressional intent" to exempt suits brought under a particular statute from that rule. *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979). There is nothing in either the language of Title VII or its legislative history that suggests such a legislative intent. To the contrary, there is an indication that Congress has chosen to rely upon the EEOC rather than private parties to bring broad Title VII actions in which different or competing interests are involved. *See General Telephone Co. v. EEOC*, 446 U.S. at 331.

ARGUMENT

I. RULE 23(a) DOES NOT PERMIT THE FIFTH CIRCUIT'S ACROSS THE BOARD APPROACH TO EMPLOYMENT DISCRIMINATION CLASS ACTIONS

Rule 23(a) of the Federal Rules of Civil Procedure establishes four requirements for the maintenance of a class action. Three of those requirements are at issue in this case:[3] (1) whether there are "questions of law or fact common to the class" ("common questions requirement"), (2) whether the claims of the plaintiff are "typical" of the claims of the class ("typicality requirement"), and (3) whether the plaintiff "will fairly and adequately protect the interests of the class" ("adequacy requirement").

[3] The "numerosity" requirement of rule 23(a)(1) is not at issue here.

In this case, the Fifth Circuit determined that those requirements were satisfied because—and only because—the action was deemed to be an "across the board" employment discrimination case. It did so even though the plaintiff who was complaining of intentional discrimination in denial of a promotion was also seeking to represent a class of applicants complaining of an entirely different type of discrimination (the disparate impact of the hiring process), a type of discrimination that the plaintiff had never personally experienced.

The Fifth Circuit has long considered[4] that in such across the board employment discrimination actions, the allegation that the named plaintiff has been injured by the defendant's discrimination against persons sharing his racial, sexual, or ethnic characteristics will generally[5] meet the commonality, typicality, and adequacy requirements of rule 23(a), regardless of differences that may exist between his claims and those of the class.[6]

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[4] *See, e.g.*, Long v. Sapp, 502 F.2d 34, 42-43 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-25 (5th Cir. 1969).

[5] While the Fifth Circuit has on occasion upheld a district court's departure from the across the board approach, *see, e.g.*, Jamerson v. Board of Trustees, 662 F.2d 320, 325 (5th Cir. 1981); Crawford v. Western Elec. Co., 614 F.2d 1300, 1304 (5th Cir. 1980), it has not reversed a district court class certification based on the across the board presumption.

[6] *See, e.g.*, IMPACT v. Firestone, 24 Fair Empl. Prac. Cas. 572, 575 (N.D. Fla. 1980) ("In this circuit the Rule 23(a)(2) and (3) 'commonality' and 'typicality' requirements may be satisfied by an 'across the board' attack on the defendant's allegedly unequal employment practices."); Alexander v. Gino's, Inc., 621 F.2d 71, 75 (3d Cir.), *cert. denied*, 449 U.S. 953 (1980) ("The essence of [the across the board] theory is that the named plaintiff may challenge conduct affecting the class even if he himself has not been affected by the conduct. . . . In effect, it loosens the typicality and adequate representation requirements of rule 23(a)(3) and (a)(4)."); Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688, 711 (1980) ("failure to define the class by reference to the named plaintiff's individual claim is characteristic of the 'across-

Falcon alleged in his complaint that both the injury he suffered from being denied a promotion and the various injuries the class suffered (including denial of employment) were the result of General's "policy" of discrimination. However, he did not offer any evidence that there was such a comprehensive company policy. Indeed, even at trial, Falcon made no effort to prove that the alleged promotion discrimination and the alleged hiring discrimination resulted from such a common policy. *See* pp. 4-5 *supra*.

The court of appeals held that evidence of such a common discriminatory policy is not required. It stated that merely by complaining of employment practices *"alleged* to have been committed . . . pursuant to a policy of racial discrimination," the named plaintiff *"demonstrated* a sufficient nexus to enable [him] to represent other class members suffering from different practices *motivated* by the same policies," [7] and thus satisfied *all* of the requirements of rule 23(a). (PA 13-14.)

Not only has the Fifth Circuit used this across the board approach in finding the requirements of rule 23(a) satisfied on the basis of mere allegations in other employment discrimination cases,[8] but this approach has also been endorsed by certain other courts,[9] although some of

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the-board' approach to Title VII class actions"; "a conclusory allegation of classwide discrimination is sufficient for certification").

[7] PA 12 (emphasis added) (quoting Payne v. Travenol Labs., Inc., 565 F.2d 895, 900 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978)). The court of appeals ignored the fact that the claims of discrimination on behalf of the applicant class were tried not on a theory of discriminatory motive or intent but on a disparate impact theory.

[8] *See, e.g.*, Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1123-25 (5th Cir. 1969).

[9] *See, e.g.*, Lamphere v. Brown Univ., 553 F.2d 714, 718 n.11 (1st Cir. 1977); Muka v. Nicolet Paper Co., 24 Fair Empl. Prac. Cas. 672, 674 (E.D. Wis. 1979). *See also* Karro, *The Importance of Being Earnest: Pleading and Maintaining a Title VII*

them may have stopped doing so since this Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).[10]

A. The Across the Board Approach Is Inconsistent with the Decision of this Court in *Rodriguez* and Its Rationale in *General Telephone Co. v. EEOC*

The Fifth Circuit's across the board approach should not be rejected simply because it results in broad-based class actions encompassing different types of alleged employment discrimination. Instead, it should be rejected because it *presumes* that a complainant alleging that he has suffered from a policy of race, sex or ethnic discrimination may appropriately represent a class of all others allegedly suffering any type of employment discrimination resulting from the alleged policy. This presumption avoids careful consideration of whether, on the particular facts of the case, the requirements of rule 23(a) have been met. The result, here and in many other cases where this approach has been followed, has been certification of classes when the common questions, typicality, or adequacy requirements were in fact not satisfied. This is unfair not only to the defendants in these cases, but also to absent class members, who are thereby deprived of the protections of rule 23(a).

This Court has indicated that the across the board approach to class certification is wrong. In *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), it held that the Fifth Circuit had erred in certifying a class, because the named plaintiffs were not members of the class they claimed to represent. The Court noted that there were strong factual indications in the record that the named plaintiffs would not be able to satisfy the rule 23(a)(4) requirement that they "fairly

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Class Action for the Purpose of Resolving the Claims of Class Members, 49 Fordham L. Rev. 904, 942-43 (1981) (collecting and criticizing cases).

[10] *See* note 11 *infra*.

and adequately protect the interests of the class." *Id.* at 404-05. It expressly disapproved of the Fifth Circuit's failure to take the particular facts involved in the case into account when determining whether the rule 23(a) requirements had been met, and cautioned:

> [C]areful attention to the requirements of Fed. Rule Civ. Proc. 23 remains . . . indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.

Id. at 405-06. A clearer rejection of the across the board approach can scarcely be imagined.

The rationale of *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980), also contradicts the across the board approach. In *General Telephone* this Court held that under section 706(f)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (1976), the EEOC may bring across the board suits seeking relief for the entire work force of an employer without meeting the requirements of rule 23. An integral part of the Court's reasoning was that imposition of the requirements of rule 23 on the EEOC would impermissibly frustrate attempts to challenge all of the employment practices of a single employer. *Id.* at 330-31. The Court noted that imposition of the 23(a)(3) typicality requirement on EEOC would "limit the class claims to those fairly encompassed by the named plaintiff's claims," while the 23(a)(4) adequacy requirement would preclude a class action "where there is a conflict of interest between the named plaintiff and the members of the putative class." *Id.* If the Fifth Circuit's across the board approach could be utilized, the typicality and adequacy requirements would not produce such results, and this Court would not have had to exempt the EEOC from the requirements of rule 23. Thus, the reasoning of the Court in *General Telephone* implicitly assumes that the Fifth Circuit's across the board approach is contrary to rule 23(a).

Many lower courts have heeded this Court's clear directives. They have rejected the across the board approach and have begun to examine employment discrimination suits on a case-by-case basis to determine whether the requirements of rule 23(a) are in fact met.[11] But the Fifth Circuit in the present case and in the subsequent case of *Phillips v. Joint Legislative Committee on Performance & Expenditure Review*,[12] has refused to abandon the across the board approach.[13] Instead, as in this case (PA 12 n.7), it has limited *Rodriguez* to its precise facts[14]—where the record shows that the defendant employer did not discriminate against the named plaintiffs in any way.[15] In so doing, the Fifth Circuit has failed to

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[11] *See, e.g.*, Patterson v. General Motors Corp., 631 F.2d 476, 480 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1988 (1981); Abron v. Black & Decker (U.S.) Inc., 654 F.2d 951, 954-55 (4th Cir. 1981); Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273-74 (4th Cir. 1980); Hill v. Western Elec. Co., 596 F.2d 99, 101-02 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); Golden v. Local 55, Int'l Ass'n of Firefighters, 633 F.2d 817, 824 (9th Cir. 1980). *See generally* Rutherglen, *supra* note 6, at 723. The Tenth Circuit had rejected the across the board approach prior to this Court's decision in *Rodriguez*. *See* Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270-71 (10th Cir. 1975).

[12] 637 F.2d 1014, 1024 (5th Cir. 1981).

[13] Other courts have acted similarly. *See, e.g.*, Alexander v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 565 F.2d 1364, 1369, 1373 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); Rosario v. New York Times Co., 84 F.R.D. 626, 629 (S.D.N.Y. 1979); Beasley v. Griffin, 81 F.R.D. 114, 116-17 (D. Mass. 1979).

[14] The Fifth Circuit has not, however, limited *Rodriguez* to its facts in class actions that do not involve allegations of employment discrimination. *See* Johnson v. American Credit Co., 581 F.2d 526, 532-33 (5th Cir. 1978).

[15] See Satterwhite v. City of Greenville, 578 F.2d 987, 993 n.8 (5th Cir. 1978) (en banc), *vacated and remanded on other grounds*, 445 U.S. 940 (1980). In *Phillips*, the Fifth Circuit distinguished *Rodriguez* on the ground that that decision requires only that the named plaintiff be a member of the class in order to have standing under article III. The court reasoned that since the named plaintiffs were members of a class as broadly defined under the across

heed the language quoted above from *Rodriguez* that clearly mandates a careful review of the facts—not merely the complaint—in all employment discrimination class actions in order to ensure that the requirements of rule 23 will in fact be met.

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the board approach, the requirements of standing were satisfied. 637 F.2d at 1024.

This reasoning will not stand analysis. First, this purely definitional approach to standing is not responsive to the policies underlying the article III requirement that a litigant must have a "personal stake" in the controversy before the court, *see, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 738 (1972); Baker v. Carr, 369 U.S. 186, 204 (1962), and the corollary requirement that a representative litigant must be a member of the class that he seeks to represent. *See, e.g.*, East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1976); Bailey v. Patterson, 369 U.S. 31, 32-33 (1962). *See generally* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297 (1979).

More important for present purposes, the *Phillips* court's attempted equation of standing requirements and the requirements of rule 23 is groundless. While the standing doctrine serves to ensure that there is in fact a genuine dispute needing resolution by the courts, the requirements of rule 23 are intended to ensure that the representative of a class can satisfy the requirements of due process by fairly and adequately representing the class, *see* Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 39 n.10 (N.D. Cal. 1977); Note, *The Juridical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship Between Standing and Typicality*, 58 B.U. L. Rev. 492, 493-96 (1978); Note, *Class Standing and the Class Representative*, 94 Harv. L. Rev. 1637, 1652-56 (1981). Accordingly, this Court has recognized that a plaintiff may have standing to represent a class yet still be unable to satisfy the requirements of rule 23(a). *See* United States Parole Comm'n v. Geraghty, 445 U.S. 388, 405-07 (1980); Kremens v. Bartley, 431 U.S. 119, 130-31 n.12 (1977).

B. The Fifth Circuit's Across the Board Approach Does Not Provide Sufficient Information to Determine That Rule 23(a) Is Met

1. *The Across the Board Approach Inappropriately Permits Class Certification on the Basis of the Allegations in the Complaint*

The trial court certified an across the board class solely on the basis of boilerplate allegations in the complaint that Falcon and class members had suffered from the same discriminatory policy of the defendant. Falcon never attempted to introduce evidence to meet his burden of showing that he was an appropriate class representative;[16] he relied solely on the across the board character of this complaint to carry his burden. The trial court certified the class prior to the introduction of any evidence and without holding an evidentiary hearing; it made no findings of fact to support its certification order. *See* p. 4 *supra*. The court of appeals nevertheless affirmed this procedure.

This approach effectively undercuts rule 23(a). The terms of rule 23(a) must be given meanings that comport with their intended purposes.[17] When these purposes are understood, it becomes clear that the courts should not rely solely on the complaint—as the district court and the Fifth Circuit did in this case—in order to certify a class, because the complaint contains insufficient information on which to base the certification decision.

The "common questions of law or fact" requirement of rule 23(a)(2) is primarily intended to ensure that class

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[16] The party seeking to be certified as the representative of a class has the burden of showing that he can meet the requirements of rule 23. *See, e.g.*, Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 277-78 (4th Cir. 1980); King v. Gulf Oil Co., 581 F.2d 1184, 1186-87 (5th Cir. 1978).

[17] Statutory terms must be given a definition that will further the purpose of the statute. *See, e.g.*, Johansen v. United States, 343 U.S. 427, 431 (1952); 2A Sutherland on Statutory Construction § 56.02 (C. Sands ed. 1973).

certification will conserve the resources of both litigants and the judiciary.[18] In equity practice, where the class action device and the common questions requirement originated, adjudication of the rights of multiple parties by means of a class action was permitted only in order to prevent a multiplicity of suits. By avoiding repeated litigation of the same issues, courts of equity were able to save the parties and the courts from needless expenditures of resources in litigation of the same questions.[19] Thus, a case can be said to involve "common questions of law or fact" within the meaning and purpose of rule 23(a)(2) only if the plaintiff can demonstrate that during the trial of his personal claim the court will make specific findings of fact or conclusions of law that it or another court would also have to make in resolving the claims of other class members.[20]

The underlying goal of the rule 23(a)(3) requirement that the claims of the representative plaintiff be "typical" of the claims of the class is to make use of the self-interest of the named plaintiff to ensure that he will not intentionally slight or abandon the claims of the class. The typicality requirement makes it clear that trial courts should not entrust the prosecution of the claims of absent

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[18] *See, e.g.*, Local 194, Retail Wholesale & Dep't Store Union v. Standard Brands, Inc., 85 F.R.D. 599, 605 (N.D. Ill. 1979); *cf.* Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (class action device permits issue common to all class members "to be litigated in an economical fashion under Rule 23").

[19] *See* Z. Chafee, Some Problems of Equity 201 (1950) (cited in the Advisory Comm. Notes to the 1966 amendments to rule 23, 39 F.R.D. 98, 102-03); Z. Chafee at 149; Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich. L. Rev. 878, 901-02 (1932) (cited in the Advisory Comm. Notes to the original 1938 version of rule 23, *reprinted in* 28 U.S.C.A., comments to rule 23, at 48); McLaughlin, *The Mystery of the Representative Suit*, 26 Geo. L.J. 878, 889-91 (1938); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1345 (1976).

[20] The language of 23(a)(2) is in the plural, suggesting that more than one common question is required.

class members to one who has only an altruistic interest in prosecuting those claims. Instead, as the Reporter for the 1966 Rules Advisory Committee has stated, the typicality requirement "emphasizes that the representatives ought to be squarely aligned in interest with the represented group." [21] Where the class representative is allowed to litigate only those claims that are "fairly encompassed" [22] by his own claims, the danger that the class representative will slight or abandon the claims of the absentees is greatly diminished.[23] Thus, while many verbal for-

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[21] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 387 n.120 (1967). The 1966 Advisory Committee Notes to subsection (a) of amended rule 23 cite two authorities in support of the subsection. 39 F.R.D. at 100. One of these, Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433, 458-59 (1960), suggests "a test based upon identity of interest in the litigation and the will and opportunity to represent the class in the litigation." *Id.* at 459 n.113. The other, 2 W. Barron & A. Holtzoff, Federal Practice & Procedure § 562 at 265, § 572 at 351-52 (C. Wright ed. 1961), states that "a class suit is a beneficial device only where the questions involving all the members of the class are the important questions, and questions peculiar to particular members of the class are distinctly subsidiary." *Id.* § 562 at 265.

[22] General Tel. Co. v. EEOC, 446 U.S. at 330; *see Rodriguez*, 431 U.S. at 403 (class representative must "possess the same interest and suffer the same injury" as class members) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)); *cf.* Kremens v. Bartley, 431 U.S. 119, 130-31 & n.12 (1977) (requirements of rule 23(a) not satisfied where there is an "obvious lack of homogeneity" within the class).

[23] *See generally* Homburger, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609, 610 (1971) ("Self-interest, the motivating force that sparks the adversary system, also sustains the doctrine of class actions. We may trust man to help his fellow man if by doing so he helps himself . . . ."); Note, *Binding Effect of Class Actions*, 67 Harv. L. Rev. 1059, 1060 (1954) ("The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representatives will assure adequate litigation of the common issues.").

mulations of the typicality requirement are possible,[24] the bedrock principle must be that the plaintiff's claim can never be typical of a claim of the class if the class claim will not be *at least* partially established if the named plaintiff prevails on his personal claim. To define as "typical" any claims of the plaintiff that would not also advance the class claims would be inconsistent with the self-interest rationale of the requirement.

Of course, typicality of claims alone may not be sufficient to ensure that the absent class members' rights are protected. By requiring that the trial court determine whether the class representative "will fairly and adequately protect the interests of the class," rule 23(a)(4) makes relevant *any* factors that suggest a representative may not be a sufficiently vigorous representative of the class. The determination whether a particular individual is capable of fairly and adequately representing a class is an intensely factual process, involving any number of factors,[25] ranging from a conflict of interest between the named plaintiff and members of the class[26] to a lack of knowledge on the part of the representative of the nature of the grievances of the class.[27]

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[24] *See, e.g.*, Cohen v. Uniroyal, Inc., 77 F.R.D. 685, 691-92 (E.D. Pa. 1977) ("claims must be similar enough to permit the court to conclude that the absent class members' claims will be fully presented"); Cottrell v. Virginia Elec. & Power Co., 62 F.R.D. 516, 520 (E.D. Va. 1974) ("disputed issue [must] occupy essentially the same degree of centrality to the named plaintiffs' claim as to that of other members of their purported class"); Note, *Juridical Links*, *supra* note 15, at 507 ("legal and factual positions of the named plaintiff [must] be so similar to those of the class that, by pressing his own claims, the representative necessarily will advance the interests of the class").

[25] *See* 3B Moore's Federal Practice ¶ 23.07[1] at 23-201, 23-203 & n.17 (1981).

[26] *See, e.g.*, General Tel. Co. v. EEOC, 446 U.S. at 331; *Rodriguez*, 431 U.S. at 405; 3B Moore's Federal Practice ¶ 23.07[3] (1981).

[27] *See, e.g.*, In re Goldchip Funding Co., 61 F.R.D. 592, 594 (M.D. Pa. 1974); Hyatt v. United Aircraft Corp., 50 F.R.D. 242, 245 (D. Conn. 1970).

This Court recognized in *Rodriguez* that the factual determinations necessary to determine whether the plaintiff would be an adequate class representative cannot be made on the basis of the allegations in the complaint. *See* 431 U.S. at 405-06 (*quoted at* p. 13 *supra*). The suggestion by some courts that this Court's reasoning in *Rodriguez* should be limited to the rule 23(a)(4) adequacy requirement[28] is myopic. The purposes of the common questions and typicality requirements also are not served by basing certification solely on the complaint. The liberal pleading requirements of rule 8(a) of the Federal Rules of Civil Procedure do not require a detailed statement of the facts underlying a claim. Thus, it is only after discovery and other pretrial procedures have "disclose[d] more precisely the basis of both claim and defense and . . . define[d] more narrowly the disputed facts and issues"[29] that the trial court will be able to determine meaningfully whether proof of the plaintiff's claims will also serve to establish at least partially the class claims, or whether certification of a class could efficiently conserve resources.[30]

Thus, the trial court will rarely if ever be able to determine from the complaint alone whether a class should be certified under rule 23(a). Instead, limited discovery directed exclusively to the issues relevant to class certification[31] and an evidentiary hearing will be

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[28] *See, e.g.*, Wajda v. Penn Mut. Life Ins. Co., 80 F.R.D. 303, 308-09 (E.D. Pa. 1978).

[29] Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

[30] *Cf.* Hale v. Allinson, 188 U.S. 56, 79-80 (1903) (since trial of case would involve "totally different" facts and witnesses, putative class action would be a "single proceeding only in name" and thus would not present common questions).

[31] *See, e.g.*, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.13 (1978) ("discovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation");

needed.[32] After such a hearing, the issues to be decided under the common questions and typicality requirements must be whether the plaintiff has identified elements common to his claims and the claims of the class and whether there is sufficient evidence of these common elements to create triable issues of fact.[33] With regard to the adequacy requirement, the plaintiff must introduce sufficient evidence to demonstrate that he will be able to represent the class fairly and adequately.

2. *The Fifth Circuit's Across the Board Approach Blurs the Requirements of Rule 23(a) and Considers Matters Irrelevant to Rule 23(a)*

The certification of across the board classes on the basis of the complaint is only one of the objectionable aspects of that approach. The approach is also objectionable because it permits across the board classes to be certified on the basis of allegations and evidence that are insufficient to meet the requirements of rule 23(a). The Fifth Circuit permits across the board classes to be certified whenever the plaintiff is able to show that there is a "nexus" between himself and the class.[34] By collapsing the requirements of rule 23(a) into such a vaguely defined requirement,[35] the Fifth Circuit semantically obscures the fact that its across the board approach permits trial courts to

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Talley v. Hoechst Fibers Indus., 24 Fair Empl. Prac. Cas. 580, 583-84 (D.S.C. 1979).

[32] The error inherent in certification of classes on the basis of the complaint cannot be rectified by a subsequent decertification of the class, for by that point the defendant will have been improperly subjected to burdensome discovery. *See* Valentino v. United States Postal Serv., 16 Fair Empl. Prac. Cas. 242, 245 (D.D.C. 1977); Karro, *supra* note 9, at 909-10, 943-44.

[33] *See* Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 479-80 (N.D. Cal. 1978); Karro, *supra* note 9, at 945-47. *See also* Rutherglen, *supra* note 6, at 724-40.

[34] *See, e.g.*, Long v. Sapp, 502 F.2d 34, 42 (5th Cir. 1974); Huff v. N.D. Cass Co., 485 F.2d 710, 714 (5th Cir. 1973) (en banc).

[35] *See Huff*, 485 F.2d at 714.

certify across the board classes on the basis of factors that are irrelevant or insufficient under rule 23(a).[36]

Thus, in this case, the court of appeals relied on Falcon's allegation that General has a "policy" of discrimination, without explaining why such an allegation or policy is pertinent to a decision whether the plaintiff has met the requirements of rule 23(a). Similarly, the appellate court declared, without explanation, that there was a sufficient "nexus" to justify the trial court's certification of Falcon to represent the applicant class, since all of the claims involved national origin discrimination and Falcon had shown a "similarity of interests" between him and the class, based on "job location, job function and other considerations."[37] (PA 12-13.)

In fact, when the requirements of rule 23(a) are considered, it can be readily seen that the purported similarity of interests based on a common ethnic group or employment interest are not sufficient to sustain the trial court's class certification. Moreover, any "similarity of interests" between Falcon and the class that is not based on the existence of common questions or typical claims is not pertinent to rule 23(a). Since Falcon's personal promotion claim does not involve common questions with the class claims and cannot advance the class hiring claims, whatever "nexus" that may exist between him and the applicant class will not be enough to make him an appropriate representative of the applicant class.

II. FALCON CANNOT SATISFY THE REQUIREMENTS OF RULE 23(a) WITH REGARD TO THE UNSUCCESSFUL APPLICANT MEMBERS OF THE CLASS

The use of the across the board approach in this case was not a harmless error. If the district court or the court

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[36] *See* Bridgesmith, *Representing the Title VII Class Action: A Question of Degree*, 26 Wayne L. Rev. 1413, 1429-30 (1980) (criticizing "mysterious" nexus requirement).

[37] As previously noted, there is no support in the record for the appellate court's statement tha tFalcon had made such a showing. *See* p. 5 *supra*.

of appeals had made the analysis demanded by rule 23(a), Falcon would not have been certified as the representative of the applicant class.

First, Falcon cannot satisfy the common questions and typicality requirements of rules 23(a)(2) and (3). As discussed above, *see* pp. 16-17 *supra*, judicial efficiency—the *sine qua non* of rule 23—will not be achieved unless common questions of law or fact underlie the issues to be tried. And even where there are common questions, certification is improper unless the class claims are "fairly encompassed" by the named plaintiff's claims. *See General Telephone Co. v. EEOC*, 446 U.S. at 330. This typicality requirement assures that the class representative will have a sufficient self-interest in pressing the claims of the absentees to safely permit him to act as their representative.[38] Other courts of appeals that have not simply presumed the appropriateness of across the board classes but have inquired into the existence of typicality in cases involving the representation of applicants by current employees have concluded—contrary to the decision below—that current employees' claims generally are *not* typical of the claims of unsuccessful applicants, because there is not a sufficient factual overlap between the discrimination claims of current employees and of applicants.[39]

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[38] *See* pp. 17-18 *supra*; DeGrace v. Rumsfeld, 614 F.2d 796, 809-10 (1st Cir. 1980).

[39] *See* DeGrace v. Rumsfeld, 614 F.2d 796, 809-10 (1st Cir. 1980); Abron v. Black & Decker (U.S.) Inc., 654 F.2d 951 (4th Cir. 1981); Hill v. Western Elec. Co., 596 F.2d 99, 101-02 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); EEOC v. Detroit Edison Co., 515 F.2d 301, 310-11 (6th Cir. 1975) ("serious doubt" that such representation is proper) (dictum), *vacated and remanded on other grounds sub nom.* Local 223, Utility Workers Union v. EEOC, 431 U.S. 951 (1977); *accord*, Fields v. Village of Skokie, 502 F. Supp. 456, 460-61 (N.D. Ill. 1980) (noting conflict among circuits and criticizing "minority view" of Fifth Circuit); *cf.* Scott v. University of Delaware, 601 F.2d 76, 87 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) (doubtful after *Rodriguez* that person not injured by hiring practices can represent class challenging such practices); Golden v.

The same conclusion must be reached here. Falcon's promotion claims are not typical of the hiring claims of the class. Moreover, litigation of Falcon's individual claim did not even involve any questions common to the litigation of the class claims.

Falcon's individual promotion claim was based on allegations of intentional discrimination ("disparate treatment") by his supervisors. (PA 18.) In order to prove this claim he tried to show that those who had passed him over for promotion were biased against Mexican-Americans (JA 79-80, 198-200; Tr. R. 252-254) and that he was at least as well qualified as those chosen for promotions. (PA 18-19.) In contrast, the claims of the hiring class were tried exclusively on a disparate impact theory [40] and their proof thereof consisted of statistical evidence that purportedly showed that the class was disproportionately disadvantaged by General's hiring practices.[41] No attempt was made to show that General intentionally

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Local 55, Int'l Ass'n of Firefighters, 633 F.2d 817, 824 (9th Cir. 1980) (current employees may not represent future applicants because they have not been "injured in the same way"); Chavez v. Tempe Union High School Dist. No. 213, 565 F.2d 1087, 1094 n.10 (9th Cir. 1977) (individual action; person not suffering hiring discrimination has no standing to raise such claims). *See also* Walker v. World Tire Corp., 563 F.2d 918, 921-22 (8th Cir. 1977).

[40] *See* Plaintiff's Trial Brief (R. 174) ("The Plaintiff would show that the company has generally discriminated against Mexican-Americans in the Irving Division in not employing sufficient numbers of Mexican-Americans although there have been sufficient applicants . . . ."); Plaintiff's Proposed Findings of Fact and Conclusions of Law (JA 206) ("These figures clearly demonstrate that Mexican-Americans have not been hired in accordance with their percentage in the labor force . . . .").

[41] *See* pp. 4-5 *supra;* Tr. R. 131-43, 150-56, 353-55. Plaintiff's counsel did contend in his closing argument that the EEOC's finding of probable cause that General's hiring practices violated Title VII constituted additional evidence in support of the class hiring claims (Tr. R. 353), but the EEOC's finding was also based exclusively on statistics. (Tr. R. 29.)

discriminated against Mexican-Americans in hiring.[42] This no doubt would have been difficult to do in view of General's affirmative action plan. (JA 166-193.)

Even if Falcon had put forth evidence of a policy of intentional discrimination by General, such evidence would not have been relevant to the disparate impact claims of the class.[43] In fact, it is doubtful that a plaintiff whose Title VII claim is based only on the "disparate treatment" theory of Title VII liability could ever represent a class whose claims are based only on a "disparate impact" theory of Title VII liability.[44] These two theories involve different ultimate questions of law and, consequently, different subsidiary legal issues, factual questions, and types of evidence.[45] Since proof of a named plaintiff's disparate treatment claim in such a case would

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[42] While in extreme cases statistical evidence of an impact that falls almost exclusively upon one group may support an inference of discriminatory intent, *see* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 241-42 (1976), there was no contention in this case that the statistical disparities were so extreme as to support an inference of motive. As plaintiff's counsel conceded during his closing argument, "this is not a clear rank discrimination case." (Tr. R. 384-85.)

[43] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Karro, *supra* note 9, at 922-23.

[44] Falcon's complaint also alleged a violation of 42 U.S.C. § 1981 (1976). It has generally been held that a violation of § 1981 may be premised on a showing of disparate treatment, but not on a showing of disparate impact. *See, e.g.*, Croker v. Boeing Co., 662 F.2d 975, 984-89 (3d Cir. 1981) (en banc), and cases cited.

[45] Under the disparate treatment theory of Title VII and § 1981 liability, the ultimate question is whether the defendant took action against the plaintiff that was *motivated* by intentional discrimination. Under the "disparate impact" theory, the ultimate question is whether a facially neutral employment practice disadvantages the members of the group of which the plaintiff is a member more heavily than the members of another group. *Compare* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), *with* Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981).

not advance the disparate impact claims of the class, the purpose of the typicality requirement would not be served by allowing the named plaintiff to represent the class.[46]

In the present case, Falcon's promotion claims would not have been typical of the class hiring claims even if both had been tried on the same general legal theory (*i.e.*, disparate impact or disparate treatment). There was no evidence (or even an allegation) that the same procedures were used in hiring and promotions. Viewed more broadly, a disparate impact challenge to one facially neutral employment practice would almost always be unrelated to a disparate impact challenge to a different facially neutral employment practice.[47] It is therefore unlikely that the typicality requirement would be satisfied, even if both the personal and the class claims had been tried on a disparate impact theory, unless the plaintiff sought to represent *only* those persons who were subject to the same policy or procedure.[48]

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[46] *See* Valentino v. United States Postal Serv., 16 Fair Empl. Prac. Cas. 242, 244 (D.D.C. 1977). Indeed, because the ultimate issues involved in disparate impact and disparate treatment cases are basically different, there may not even be common questions between them. Of course, any two cases might involve common questions of law even if the facts and ultimate questions in the cases were entirely different. For example, a Title VII case and an antitrust case might both involve an identical evidentiary question or issue of venue. It is doubtful, however, that there would ever be enough such common questions in essentially unrelated cases to satisfy the typicality requirement.

[47] *See* Karro, *supra* note 9, at 938.

[48] Even in such cases, the typicality requirement may not be satisfied if the same procedure or test is used for different purposes, for the same employment practice may be lawful when used for one purpose but not for another. *See, e.g.*, League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 901-02 (C.D. Cal. 1976) (high school diploma requirement valid for selection of policemen but not firemen). *Cf.* Cooper v. Allen, 467 F.2d 836, 839 (5th Cir. 1972) (same test used for 20 different job categories presented factual issues "too diverse to warrant class treatment").

Moreover, in this case there was no evidence (or even an allegation) that the same individuals were responsible for hiring and promotion decisions. This eliminates the possibility that the typicality requirement could be satisfied even if both the personal and the class claims had been tried on the disparate treatment theory, since the ultimate issue in a disparate treatment case is the intent of the decision maker. Proof of the discriminatory intent of a supervisor charged with the responsibility of making promotion decisions is unlikely to be of much assistance in proving the motivations of an interviewer charged with the responsibility of making hiring decisions.[49]

Thus, Falcon's efforts to prove his own personal claim, however successful, would not help the class advance its hiring claims; conversely, any evidence Falcon chose to introduce on the class hiring claims would not bolster his own claim. This had two consequences. First, instead of being able to rely on a "community of interest" [50] between themselves and Falcon, the absent members of the applicant class were forced to rely on Falcon's good will and voluntary efforts in their behalf. Second, the combined trial of the totally dissimilar hiring and promotion claims produced no efficiency of judicial effort. Hence, the purposes of neither the typicality nor common questions requirements were satisfied.

Even more damaging to Falcon's claim that he is an appropriate representative of those with hiring claims is the evidence in the record of a conflict of interest between Falcon and the applicant class. The relief requested by Falcon for promotion discrimination included

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[49] *See, e.g.*, Rutherglen, *supra* note 6, at 708; Karro, *supra* note 9, at 939; *cf.* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 622 (1974) ("Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor.").

[50] DeGrace v. Rumsfeld, 614 F.2d 796, 809 (1st Cir. 1980).

a requirement that General make good faith efforts to fill its management level positions with Spanish-surnamed Americans until 5.24% of these positions were held by Spanish-surnamed Americans. (JA 211.) Moreover, General had already voluntarily implemented an affirmative action plan under which there were specific minority goals and timetables. (JA 166-193.) Since most management positions were filled by internal promotions, and promotions were *not* made on the basis of seniority, it was in Falcon's interest that the total number of Mexican-American employees be kept low, in order to minimize the number of persons with whom he would be competing for management slots, under the preexisting affirmative action plan and under the plan he had proposed. Falcon's personal interest in attaining a management position was thus diametrically opposed to the class' interest in increasing the number of Mexican-Americans hired.

Such conflicts of interest as to the subject matter of the suit preclude any finding that Falcon would be able to fairly and adequately protect the interests of the applicant class members. *See* p. 19 *supra*. As the Court made clear in *General Telephone Co. v. EEOC*, the adequate representation requirement is properly construed to disallow a class action where there are such conflicting interests between the named plaintiff and putative class members.[51] In fact, the Court specifically addressed such a situation where there are conflicts of interest between employees and applicants: "In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule

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[51] 446 U.S. at 331; *see* Sosna v. Iowa, 419 U.S. 393, 403 (1975); *Rodriguez*, 431 U.S. at 405. *See generally* Note, *Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23*, 53 B.U. L. Rev. 406, 410, 418-27 (1973).

23, the same plaintiff could not represent these classes." 446 U.S. at 331.

The Third Circuit had earlier reached a similar conclusion. In *Scott v. University of Delaware*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979), the court held that a current employee could not be an adequate representative of a class of applicants since his interests were necessarily in conflict with those of applicants for two reasons: first, because he had personally benefited from the hiring procedures he was seeking to attack on behalf of applicants; and second, because he would have been in sharp competition for contract renewal and tenure with any applicants who might be offered positions as a result of his suit. *Id.* at 86 & n.21.

The ability of Falcon to represent the applicant class fairly and adequately is also open to serious question because he had personally benefited from the hiring procedures challenged by the class[52] and because of his continuing lack of knowledge of or interest in the hiring claims.[53] His EEOC charge did not mention hiring discrimination (PA 5-6), and he testified at trial that he did not know a single Mexican-American whose application had been rejected by General. (JA 78.)[54]

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[52] Scott v. University of Delaware, 601 F.2d at 86 (conflict of interest barred employee from challenging doctoral degree hiring requirement on behalf of applicant class when plaintiff was relying on his possession of doctoral degree in proving his individual claim of disparate treatment in termination). In a non-Title VII case, Judge Tuttle, the author of the opinion in this case, held that rules 23(a)(3) and (4) barred the grouping into a single class of individuals injured by a voting reapportionment plan with individuals who benefited from the plan. *See* Fairley v. Patterson, 493 F.2d 598, 604 n.8 (5th Cir. 1974).

[53] *See* note 27 *supra; cf.* DeGrace v. Rumsfeld, 614 F.2d at 810 (former employee may not be adequate representative of current employees because he has no personal interest in remedying discriminatory working conditions).

[54] General of course recognizes, as this Court has noted, that many suits alleging discrimination are "by their very nature class

III. THERE IS NO POLICY OR STATUTORY BASIS FOR EXEMPTING EMPLOYMENT DISCRIMINATION SUITS FROM ANY OF THE REQUIREMENTS OF RULE 23

The Fifth Circuit and others have suggested that individual plaintiffs must be permitted to bring across the board class actions, regardless of whether the requirements of rule 23 have been satisfied, in order to effectuate the broad remedial purposes of Title VII.[55] But those arguing this position have failed to explain how weakening the requirements of rule 23 would further the substantive antidiscrimination policies of Title VII.[56] In fact, the purposes of rule 23 and Title VII are complementary, not conflicting. A failure carefully to observe the requirements of rule 23 thus can undercut not only the purposes of rule 23 but also the purposes of Title VII. Moreover, neither the language nor the legislative history of Title VII reveals a congressional intent to authorize individual Title VII plaintiffs to bring class actions without regard to the requirements of rule 23. To the contrary, Congress recognized the risks of relying on private individuals to shoulder the often expensive and burdensome task of litigating the claims of persons with whom they might have little in common and of balancing the differing or conflicting interests of the various

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suits," *Rodriguez*, 431 U.S. at 405, such as where an individual is personally aggrieved by the disparate impact of a departmental seniority system, *see, e.g.*, California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980), or the use of test proficiency as a criterion for employee selection, *see, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). Disparate treatment cases can also be brought as class actions by those affected by the same discriminatory decisions, such as the subjective judgments of a personnel officer.

[55] *See, e.g.*, Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974); Beasley v. Griffin, 427 F. Supp. 801, 805 (D. Mass. 1977); 13 Harv. C.R.-C.L. L. Rev. 175, 188-89 (1978). *See generally* Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 Yale L.J. 868 (1979).

[56] *See* Rutherglen, *supra* note 6, at 689-90.

groups encompassed in a broad-based action. This recognition appears to have been a significant factor in the decision to give the Equal Employment Opportunity Commission ("EEOC") the power to bring representative suits in the federal courts.

A. Automatic Certification of Across the Board Employment Discrimination Class Actions Subverts the Basic Purposes of Title VII and Rule 23

Those who believe that loosening the requirements of rule 23(a) would further the purposes of Title VII erroneously assume that the representative plaintiff will inevitably win, since the substantive antidiscrimination purpose of Title VII is frustrated, not furthered, when the named plaintiff in fact does not prevail on meritorious class claims[57] or prevails on such claims but fails to seek and obtain relief adequate to redress the injuries suffered by the absentees.[58] The provisions of rule 23, particularly the requirements of subsections (a)(3) and (a)(4), are intended to ensure that class representatives will make vigorous and comprehensive efforts to prevail on meritorious class claims. These provisions are thus supportive of the substantive purposes of Title VII.

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[57] *See* Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 474 (N.D. Cal. 1978); Rutherglen, *supra* note 6, at 725-26; Shawe, *Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance with Federal Rule of Civil Procedure 23(a)*, 19 Wm. & Mary L. Rev. 469, 486-87 (1978).

Because employment discrimination class actions, including the present one, are generally certified under rule 23(b)(2), *see, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248-49 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *see generally* Note, *Due Process Rights of Absentees in Title VII Class Actions—The Myth of Homogeneity of Interest*, 59 B.U. L. Rev. 661, 665 (1979), absent class members are generally not given any opportunity to opt out of the litigation either before or after the entry of judgment. The protections of rule 23(a) are thus of particular importance in these actions. *See* Grigsby v. North Mississippi Med. Center, Inc., 586 F.2d 457, 461 (5th Cir. 1978).

[58] *See generally* Note, *Class Action Judgments and Mutuality of Estoppel*, 43 Geo. Wash. L. Rev. 814, 831 n.112 (1975).

Judge Godbold, in a perceptive opinion specially concurring in the very first case where the Fifth Circuit relied on the across the board approach to certify a class, accurately described the dangers that arise when courts ignore these protections in favor of routine certification of across the board classes:

> It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?
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> * * * *
>
> [C]ounsel, and at times the courts, are moving blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on members of the class. It is not quite that easy.[59]

In fact, by overlooking the protections of rule 23(a) and certifying across the board actions as a routine matter, the Fifth Circuit has greatly increased the risk that the Title VII rights of absent members of some classes will not be vindicated, but lost. By failing to require that the named plaintiffs' claims be typical of the claims of the class, the absent class members are forced to rely not on the self-interest of the class representative in pressing his own claims, but on the altruism of the plaintiff in deciding whether and how vigorously to press their claims. While this could well prove an insufficient protection in any class suit,[60] this danger is exacerbated be-

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[59] Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126-27 (5th Cir. 1969) (Godbold, J., specially concurring).

[60] *See* Note, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. Pa. L. Rev. 1217, 1227 n.45 (1975) ("it would take an extremely altruistic litigant to represent an entire class in costly and time-consuming litigation if their interests differed from his").

cause of the complex nature of Title VII class actions.[61] In across the board actions challenging diverse types of employment practices, the claims of absentees may simply be lost in the shuffle,[62] or the class representative may choose, as a tactical decision, to emphasize his own claims at the expense of the class claims. Indeed, many courts and commentators have noted the natural tendency in such cases for the class representative to devote the major portion of his time and resources to the claim

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[61] The Senate Labor Committee Report on the bill that became the 1972 Amendments to Title VII noted:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization....
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful.

S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971) (footnote omitted), *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 414 (1972) [hereinafter cited as "Legislative History"].

[62] *See* Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 43-44 (N.D. Cal. 1977); Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 350 (E.D. Va. 1976) (in across the board employment discrimination action, claims of one subclass "were seemingly lost in the breadth and ambition of the class's overall interest"), *vacated on other grounds*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); Karro, *supra* note 9, at 940-41; Note, *Due Process Rights*, *supra* note 57, at 673.

in which he has a direct personal stake,[63] to the likely detriment of the absent class members.[64] Moreover, across the board certification, where there is a conflict of interest between the named plaintiff and the class, again works to the detriment of the class by entrusting class members' rights to one whose self-interest lies in seeing that they do not prevail or do not obtain full redress for their injuries.[65] Thus, whatever advantages the across the board approach may have for the named plaintiff in Title VII actions [66] and for his attorney,[67] it may have the effect of frustrating the

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[63] *See, e.g.*, Patterson v. General Motors Corp., 631 F.2d 476, 481 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1988 (1981); Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 474 (N.D. Cal. 1978) (noting "the subtle influence the representative plaintiff's viewpoint may have in shifting the focus of discovery and trial preparation"); Local 194, Retail Wholesale & Dep't Store Union v. Standard Brands, Inc., 85 F.R.D. 599, 606 (N.D. Ill. 1979); Karro, *supra* note 9, at 940-41; Note, *Due Process Rights*, *supra* note 57, at 676 ("[t]he complexity of the larger cases tends to force interests peripherally connected with the named plaintiff to the perimeter of the litigation").

[64] *See, e.g.*, Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 423 (5th Cir. 1980) (noting that black class representatives' "preoccupation with the issue of black promotion seemingly led" them to fail to introduce any evidence on the hiring claims of the absent Mexican-American class members), *vacated and remanded on other grounds*, 101 S. Ct. 1967 (1981); Koos v. First Nat'l Bank, 496 F.2d 1162, 1165 (7th Cir. 1974); Note, *Due Process Rights*, *supra* note 57, at 669 & n.67, 673-74; *cf.* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1007 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) (Stevens, J., dissenting) (interest of absent class members in avoiding dismissal was a "matter of indifference" to named plaintiff).

[65] *See generally* Hansberry v. Lee, 311 U.S. 32, 44 (1940); Note, *Due Process Rights*, *supra* note 57, at 673-80; *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1593 n.66 (1976).

[66] *See* discussion at pp. 36-37 *infra*.

[67] Many commentators have noted that broad across the board class actions can be quite lucrative for the class attorney. *See, e.g.*, Shawe, *supra* note 57, at 489-90; *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1604-05 (1975).

purposes of Title VII by depriving absent class members of an opportunity to vindicate their personal Title VII rights.[68]

Of course, the interests of absent class members are protected, at least to a degree, by the possibility of collateral attacks on judgments rendered in favor of defendants.[69] However, this possibility not only creates problems for defendants and the courts, but it also undercuts the purposes of rule 23. Clearly, the certification of across the board classes in employment discrimination suits, by increasing the likelihood that the class will be inadequately represented, subjects defendants to an additional risk of successful collateral attacks from absent class members on judgments entered in defendants' favor.[70] Facilitating collateral challenges to class action

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[68] The Government, in its Brief in General Tel. Co. v. EEOC, stressed that the typicality requirement of rule 23(a)(3) should be carefully observed in Title VII class actions in order to protect the due process rights of absent class members "who ordinarily have no choice as to whether to be represented in a private class action." Brief of Federal Respondent, General Tel. Co. v. EEOC, 446 U.S. 318 (1980), at pp. 19-20.

[69] A class action judgment cannot, consistently with due process, be given binding effect unless the representative plaintiff had interests in common with the absentees and adequately represented those interests. *See* Hansberry v. Lee, 311 U.S. 32, 43-45 (1940). *See generally* Note, *The Importance of Being Adequate*, *supra* note 60, at 1217. Of course, such collateral attacks are not an effective means of guaranteeing the Title VII rights of absentees, many of whom are not sophisticated enough to recognize that their prior representation had been inadequate. *See* Karro, *supra* note 9, at 954.

[70] *See* Talley v. Hoechst Fibers Indus., 24 Fair Empl. Prac. Cas. 580, 584-85 (D.S.C. 1979); *see, e.g.*, Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 350-52 (E.D. Va. 1976), *vacated on other grounds*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); *cf.* A. Miller, An Overview of Federal Class Actions: Past, Present and Future 29 (1977) (Federal Judicial Center Study) ("a number of the class actions terminated in the years following the promulgation of the amended version of Rule 23 are vulnerable to collateral attack because sufficient attention was not paid" to ade-

judgments in this way inevitably wastes the resources of the courts by forcing them to try the same claims twice.[71]

It also may permit absentee members of improperly certified across the board classes to take advantage of the judgment if it is in their favor *and* to avoid the effect of the judgment if it is not. This amounts, in effect, to a return to the one-way intervention by absent plaintiffs permitted under the pre-1966 version of rule 23.[72] The unfairness of such one-way intervention has been widely criticized, and the elimination of this practice was one of the primary purposes of the 1966 amendments.[73]

The across the board approach is also unfair to defendants because, as this Court and others have noted, it can transform every individual claim into a sweeping class action, with an enormous increase in the time and cost of defense and therefore in the bargaining power of individual plaintiffs and their attorneys. This may unduly pressure defendants to settle non-meritorious or even frivolous claims.[74] To the extent this pressure also

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quacy of representation). *See generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974).

[71] *Cf.* Kyriazi v. Western Elec. Co., 647 F.2d 388, 394 (3d Cir. 1981) (recognizing the "strong interest of the judiciary in maximizing the res judicata effect of a class action judgment").

[72] *See* Note, *Collateral Attack*, *supra* note 70, at 601 (quoting Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968)): "To facilitate successful challenges to the binding effect of class action judgments is to create a postjudgment election to opt out—'a return to one-way intervention under a new guise.'"

[73] *See* Advisory Comm. Notes, 39 F.R.D. 98, 105-06 (1966); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 546-47 (1974).

[74] *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); Rutherglen, *supra* note 6, at 725-26 & n.214; Shawe, *supra* note 57, at 489-92; *cf.* Handler, *The Shift from Substantive to Pro-*

forces employers to avoid conduct that is legal under Title VII (*e.g.*, termination of incompetent employees), the congressional purpose underlying that statute is subverted.[75]

The impact of the across the board approach on the courts is at least equally severe and inappropriate. By ignoring the limits imposed on the class action device by rule 23(a), this approach greatly increases judicial workloads for no good cause. First, by allowing the plaintiff to force the litigation of claims that are dissimilar to the claim of the named plaintiff, the across the board approach burdens the courts with claims that no class member may be interested in pressing.[76] Second, by requiring the joint trial of the dissimilar claims of plaintiff and absent class members in a single complex action, the across the board approach enormously complicates the trial of the named plaintiff's claim and may stretch the managerial resources of the trial court to the breaking point.[77] Trial courts have noted with dismay the sub-

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cedural Innovations in Antitrust Suits, 71 Colum. L. Rev. 1, 9 (1971) (suggesting that overbroad classes are "a form of legalized blackmail").

[75] *Cf.* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) ("Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1357 (1976) ("The combination of huge judgments and high litigation costs may cause class opponents to protect themselves by refraining not only from socially inefficient activity but also from activity which is in fact socially desirable.").

[76] *See* Gulf Oil Co. v. Bernard, 101 S. Ct. 2193, 2199 n.11 (1981) ("traditional concerns about 'stirring up' litigation remain relevant in the class-action context"); Note, *Class Actions*, *supra* note 51, at 429; *cf.* Weinstein, *supra* note 21, at 462 (suggesting class action is inappropriate if "brought by a few malcontents").

[77] *See* Karro, *supra* note 9, at 923 n.107; Shawe, *supra* note 57, at 487-88; Note, *Class Actions*, *supra* note 51, at 428.

stantial and arcane evidence that they have had to consider in many employment discrimination cases.[78] Perhaps there is no alternative to doing so in resolving the claims of plaintiffs and those presenting similar claims but surely the potential for overwhelming complexity in broad Title VII actions underscores the need for careful attention to the requirements of rule 23.[79]

This case provides several examples of the ill effects that frequently arise from the across the board approach. First, the interests of the absent class members were endangered. While Falcon did not abandon the class hiring claims, he did not give them the same attention he gave to his personal claim of discriminatory denial of a promotion. Falcon called several Company witnesses at trial in order to prove his own claim, cross-examining them closely concerning their attitudes toward and social relationships with Mexican-Americans. He also introduced extensive evidence concerning his qualifications and the qualifica-

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[78] *See* Vuyanich v. Republic National Bank, 505 F. Supp. 224, 394 (N.D. Tex. 1980) (170-page opinion confessing that it reflected "what I think happened, approximately" and that the opinion itself had taken on a "surrealistic cast" resulting from the "esoterics of econometrics and statistics which both parties have required this court to judge"); Association Against Discrimination in Employment v. City of Bridgeport, 454 F. Supp. 751, 755 (D. Conn. 1978) (noting that "the attorneys and the Court have been led by the conflicting testimony of two experts, who spoke in an alien tongue, through a labyrinth of statistical analysis that might well have intimidated Odysseus").

[79] The EEOC faced a similar problem in 1977. The Commission had been pursuing a policy of investigating not only the specific discrimination alleged by the charging party, but also other unrelated types of discrimination possibly suffered by other of the defendant's employees. The result was an overwhelming backlog of uninvestigated and unresolved charges. To deal with this situation, EEOC Chair Eleanor Holmes Norton instituted a rapid charge processing system under which the focus was on the personal claims of the charging party. *See* 141 Daily Lab. Rep. (BNA) A-4, E-1 (July 21, 1977) (EEOC resolution); 145 Daily Lab. Rep. (BNA) AA-1, E-1 (July 27, 1977) (statement of EEOC Chair Norton before House Labor Subcommittee on Employment Opportunities).

tions of those promoted instead of him. In contrast to his personal claim, Falcon chose to let the class hiring claims rise or fall on a few simple statistical exhibits.[80] Moreover, although Falcon sought specific goals for promotions of Mexican-Americans, he did not seek similarly specific hiring goals, but instead relied primarily on increased recruiting efforts as the injunctive remedy for hiring discrimination. (JA 208, 211.)

The certification of the overbroad class is a matter of concern for General as well as for the applicant class members. If the findings of hiring discrimination were to be reversed on remand, the apparent conflict of interest between Falcon and applicants, coupled with his lack of knowledge about these claims and the limited presentation he made of evidence concerning them, might give rise to assertions by class members that this case should not be given *res judicata* effect because Falcon was not an adequate representative for purposes of due process.[81] This concern is not frivolous. The Fifth Circuit has denied *res judicata* effect to a judgment adverse to an applicant class entered in a case presenting remarkably similar facts, because the class representatives appeared to have been "much more intent upon establishing their individual claims" than the class hiring claims.[82]

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[80] Whether Falcon's efforts have prejudiced the class remains to be seen. Although the class did prevail before the trial court, the court of appeals vacated this portion of the district court's decision because of its doubts about the trial court's analysis of the statistical evidence and remanded this portion of the case for further consideration. (PA 23-28.)

[81] *See* Willborn, *Personal Stake, Rule 23, and the Employment Discrimination Class Action*, 22 B.C. L. Rev. 1, 21 n.111, 22 n.116 (1980); note 69 *supra*.

[82] Grigsby v. North Mississippi Med. Center, Inc., 586 F.2d 457, 461-62 (5th Cir. 1978). The Fifth Circuit is highly aware of the potential for unfairness to absent class members inherent in across the board class actions and readily denies *res judicata* effect to judgments adverse to classes entered in such actions. *See, e.g.*, Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979); Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 423 (5th Cir. 1980),

Finally, this case has also imposed a substantial burden on the judiciary. The discovery proceedings and trial of Falcon's now decade-old individual promotion claim have been complicated by the addition of wholly unrelated hiring claims of individuals not even known to Falcon. Moreover, there is a serious question whether Falcon forced the courts to litigate non-existent grievances. Most of the applicant class members did not bother to file claims at stage II. That thirteen claimants did come forward is hardly evidence that they believed themselves aggrieved, since they came in response to a court-ordered notice that stated that they "may be entitled to back wages." (PA 27 n.17.)

In this case and others, the across the board approach has frustrated the policies of both rule 23 and Title VII, to the detriment of absent class members, defendants in Title VII cases, the judiciary, and the general public. As one court has concluded, " '[L]iberal' application of Rule 23 to Title VII cases will not necessarily promote its remedial purposes if it means failure to adhere to and fully enforce the requirements of Rule 23 whose purpose is to balance and protect the rights of all parties, present and absent." [83] Moreover, the failure of the Fifth Circuit and certain other courts to apply rule 23 to Title VII litigation has unnecessarily burdened defendants and the courts, by encouraging plaintiffs' attorneys to add broad class allegations to their complaints in order to convert every individual claim into the broadest class action they can conceive of and have the will to prosecute.[84]

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vacated and remanded on other grounds, 101 S. Ct. 1967 (1981). Such weakening of the *res judicata* effect of class judgments may subvert the policy of Title VII, by making defendants reluctant to settle even meritorious class suits, because of the lack of assurance of finality. *See* Note, *Collateral Attack*, *supra* note 70, at 601.

[83] Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 38 (N.D. Cal. 1977) (footnote omitted).

[84] *Cf.* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 561 (1974) (Blackmun, J., concurring): "Our decision . . . must not

B. Title VII and Its Legislative History Do Not Preempt or Alter the Application of Rule 23

Rule 1 of the Federal Rules of Civil Procedure provides that the rules "govern the procedure in the United States district courts in *all* suits of a civil nature." (Emphasis added.) Thus, this Court has held that rule 23 is applicable to suits brought under every statute "[i]n the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose." *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979). Rule 23 was said to be controlling in the absence of "the necessary clear expression" of contrary congressional intent. *Id.* The language of Title VII and its legislative history contain no such "direct" expression of congressional intent that Title VII class actions are exempt from the coverage of rule 23 or subject to special application of its terms.[85]

As enacted in 1964,[86] Title VII provided for enforcement through government "pattern or practice" actions and private actions brought by individual plaintiffs. Congress authorized the EEOC to investigate and conciliate[87] individual charges of discrimination and gave aggrieved individuals the right to bring suit after failure of the EEOC's conciliation efforts or its failure to act within a prescribed time.[88] It also gave the Attorney General authority to bring suits alleging that employees

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be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights."

[85] 42 U.S.C. § 1981 need not be separately discussed, since it was enacted decades before any version of rule 23. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, *reenacted*, Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144.

[86] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 706(e), 707(a), 78 Stat. 260, 261 (1964).

[87] Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 260 (1964).

[88] *Id.* § 706(e), 78 Stat. 260.

had engaged in a "pattern or practice" of discrimination.[89]

There is no indication in the language or legislative history of the 1964 enactment of Title VII that Congress intended to authorize private litigants to bring across the board class actions challenging all the employment practices of an employer, without regard to the requirements of rule 23. To the contrary, Congress provided that across the board challenges to an employer's practices were to be brought by the Attorney General pursuant to his "pattern or practice" authority. Had Congress intended to give such "pattern or practice" authority to individual litigants, it clearly knew how to do so. It did not. Certainly there is no "direct" evidence that in 1964 Congress anticipated and endorsed the automatic certification by federal courts of across the board class actions brought by private individuals under Title VII.[90]

By 1972, Congress had concluded that the scheme established in 1964 for public enforcement of Title VII was not working to its satisfaction.[91] Congress found that the Attorney General had not initiated sufficient enforcement action through his "pattern or practice" authority.[92] Nevertheless, Congress recognized that Title VII cases involve inherently complex issues of law and fact that often can be better litigated by a public body than by a private individual.[93] Accordingly, Congress amended

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[89] *Id.* § 707(a), 78 Stat. 261.

[90] *See generally* Rutherglen, *supra* note 6, at 708.

[91] General Tel. Co. v. EEOC, 446 U.S. 318, 325 (1980).

[92] 118 Cong. Rec. 4080-81 (1972) (remarks of Sen. Williams).

[93] [U]nlike the Rule 23 class representative, the EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged. . . . The EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choices where conflicts of interest exist.

General Tel. Co. v. EEOC, 446 U.S. at 331; *see* note 61 *supra*.

Title VII to give the EEOC the authority to sue on behalf of individuals [94] and it transferred to the EEOC the Department of Justice's pattern or practice authority.[95] As this Court has determined, Congress also empowered the EEOC to bring suit on behalf of classes of employees and applicants without regard to the class certification requirements of rule 23.[96]

Congress in 1972 did not add new language to the body of Title VII regarding the scope of class suits brought by private individuals. It was concerned, however, that its determination to increase EEOC's role in enforcement of Title VII might be read by some as evincing a congressional intent to foreclose private class suits. Accordingly, a number of statements were made to disclaim such intent. Some have read into these statements congressional approval of those cases in which lower courts had utilized the across the board approach to class certification.[97] The 1972 legislative history cannot, however, be properly construed to mean that Congress intended to exempt privately-brought Title VII class actions from the requirements of rule 23.

Congress made the point that it did not intend to foreclose private Title VII class actions, first, by rejecting a proposed amendment to limit compensatory relief under Title VII to persons named in charges filed with the Commission.[98] It underscored the point by adopting an-

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[94] 42 U.S.C. § 2000e-5(f)(1) (1976).

[95] 42 U.S.C. § 2000e-6(c) (1976).

[96] General Tel. Co. v. EEOC, 446 U.S. at 323-29.

[97] *See, e.g.*, Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 875-78 (1972). Even if the 1972 legislative history could fairly be read to support such a conclusion, it would be of little relevance. *Post hoc* comments are of little or no value in interpreting legislation enacted by a previous Congress. *See, e.g.*, County of Washington v. Gunther, 101 S. Ct. 2242, 2251 n.16 (1981); International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977).

[98] *See* H.R. 9247, 92d Cong., 1st Sess. § 3(e) (1971), *reprinted in* Legislative History, *supra* note 61, at 147. This provision was

other amendment that authorizes private persons to file charges "on behalf of" a person claiming to be aggrieved.[99] In its report on the section of the bill containing this amendment, the Senate Committee on Labor and Public Welfare explained:

> This section is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that title VII actions are by their very nature class complains [*sic*], and that any restriction on such actions would greatly undermine the effectiveness of title VII.[100]

In support of this statement the Committee noted six cases,[101] which, as this Court has recognized, were intended to show that "backpay was awardable to class members who had not personally filed, nor been named in, charges to the EEOC." *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 414 n.8 (1975). Similarly, Senator Harrison Williams, sponsor of the committee bill, concluded his explanation of this matter by observing that

> [I]t is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. . . . [T]he leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints and that, *accordingly, it is not necessary that each individual entitled to relief under*

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deleted by the Conference Committee. 118 Cong. Rec. 7168 (1972), *reprinted in* Legislative History, *supra* note 61, at 1847.

[99] 42 U.S.C. § 2000e-5(b) (1976). However, Congress retained the provision of the 1964 law that a private individual may file a law suit only if he himself is "aggrieved." 42 U.S.C. § 2000e-5(f)(1) (1976).

[100] S. Rep. No. 415, 92d Cong., 1st Sess. 27 (1971), *reprinted in* Legislative History, *supra* note 61, at 436.

[101] *Id.* at 436 n.16.

the claim be named in the original charge or in the claim for relief.[102]

Therefore, the only conclusions that the 1972 amendments themselves will support about congressional intent concerning private class actions under Title VII are that Congress did not want EEOC's increased role in Title VII enforcement to foreclose such actions and it particularly did not want to require each class member to exhaust administrative remedies prior to litigation.

Congress' desire not to foreclose private Title VII class actions hardly constitutes a "direct" or "clear" expression of congressional intent to vary the application of rule 23 to Title VII cases, as required by *Califano v. Yamasaki*. *See* 442 U.S. at 700. Moreover, the remarks in the legislative history pertaining to private class actions do not show that Congress meant to preempt rule 23 in favor of across the board certification of private class actions under Title VII. Instead, they only reflect congressional intent that private Title VII class actions continue to be certified if they comply with the requirements of rule 23.

As this Court has noted, it is undesirable to depart from the provisions of rule 23. *See General Telephone Co. v. EEOC*, 446 U.S. at 329-330. It would be particularly inappropriate to do so in Title VII actions. Congress recognized in 1972 that the substantive criteria for a Title VII violation are very complex.[103] In a class action, these complexities present enormous potential for incongruity and conflicts of interest among class members and for burdensome litigation, which requires judicious application of rule 23 to protect the interests of the class and of the defendant[104] and the resources of the courts.

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[102] 118 Cong. Rec. 4942 (1972), *reprinted in* Legislative History, *supra* note 61, at 1773 (emphasis added).

[103] *See* notes 61 & 93 *supra*.

[104] *See* General Tel. Co. v. EEOC, 446 U.S. at 331; *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1633 (1976) ("the

Congress has shown on numerous occasions that it knows how to vary the application of rule 23 with respect to particular statutes when it so intends.[105] Since it did not so act with respect to Title VII in 1964 or 1972, this Court should not interpret Title VII—or rule 23—as if it had.

CONCLUSION

For the reasons stated above, the order of the court of appeals remanding the class claims to the trial court should be vacated and the case should be remanded to the district court with instructions to dismiss the class allegations from the complaint.[106]

'pattern or practice' limitation may reflect a congressional preference for greater government input where broad and intricate decrees are likely to result from litigation").

[105] *See, e.g.*, Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 15c (1976) (authorizing state attorneys general to sue on behalf of state residents); Magnuson-Moss Consumer Product Warranty Act, 15 U.S.C. § 2310(e) (1976) (class action allowed only if defendant granted reasonable opportunity to cure violation alleged); Portal-to-Portal Act, 29 U.S.C. § 216(b) (1976) (consent to representation required from class members in actions under Fair Labor Standards Act, 29 U.S.C. §§ 201-262 (1976 & Supp. III 1979), and the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976)); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (1976) (same).

[106] As this Court noted in *Rodriguez*, 431 U.S. at 406 n.12, dismissal of the class allegations is appropriate unless "the initial certification [of the class] was proper and decertification not appropriate." Since the initial certification of the class in this case and the subsequent refusals by the trial court to decertify the class were erroneous, the class must now be decertified and the remand of the class claims ordered by the Fifth Circuit vacated. *See* Scott v. University of Delaware, 601 F.2d 76, 89 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), is not to the contrary. There the Court held that a person claiming to represent a class is not deprived of standing under article III to litigate the issue of class certification simply because the purported class representative's individual claims are mooted after suit is filed. *Geraghty* differs from the present case in two fundamental respects. First, in *Geraghty* the individual plaintiff had been a member of the class

Respectfully submitted,

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January 1982

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he sought to represent at the time suit was filed. *Geraghty* holds only that a ruling reversing an erroneous denial of class certification and granting class certification "relates back" to the date of the original denial. If the named plaintiff was not a member of the class at the time class certification is denied, then "relation back" does not save the class allegations from dismissal. *See id.* at 406-07 n.11. Here Falcon has never been a member of a class of persons allegedly discriminated against with respect to hiring. Second, *Geraghty* was limited to considerations of article III standing and the Court expressly noted that the mere fact that the plaintiff there had standing did not automatically establish that the plaintiff was an adequate class representative under rule 23(a). *See Geraghty*, 445 U.S. at 405-07; note 15 *supra*.

Appendix

ADDENDUM

42 U.S.C. § 1981:

Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title VII of the Civil Rights Act of 1964, § 706(a), 42 U.S.C. § 2000e-5(a):

Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Title VII of the Civil Rights Act of 1964, § 706(b), 42 U.S.C. § 2000e-5(b):

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place, and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the

persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to that charge.

Title VII of the Civil Rights Act of 1964, § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1):

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall

refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general

public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Title VII of the Civil Rights Act of 1964, § 707(a), 42 U.S.C. § 2000e-6(a):

Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Title VII of the Civil Rights Act of 1964, § 707(c), 42 U.S.C. § 2000e-6(c):

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

On Writ of Certiorari of the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT

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February 1982

QUESTION PRESENTED

Whether across the board attacks in Title VII cases are still allowed after this Court's decision in *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

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S. Rep. No. 415, 92d Cong., 1st Sess. 27 (1971), reprinted in "Legislative History" at 436 21

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IN THE

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OCTOBER TERM, 1981

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

On Writ of Certiorari of the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT

STATEMENT

Respondent is generally in agreement with Petitioner's Statement but is dissatisfied with certain portions which omit material findings and conclusions made by the Trial Court, and which mischaracterize some of the facts established below.

Mariano S. Falcon (Falcon) located his job at General Telephone Company of the Southwest (General) through "Manpower," an agency located in the minority area of Dallas known as West Dallas.

Falcon went to the Lewisville location of General for an interview after having talked with Robert Medrano, the "Manpower" worker who took him and introduced him to Helen Soto, the personnel manager of General. (JA 76-77) Falcon was hired under an Affirmative Action Program known as Operation Attainment. At the time, Falcon went to work for General, the Irving division included Irving, Carrollton, Grapevine, Azel, Keller, and Lewisville, Texas. Subsequently, the Irving division was restructed to include only Irving, Texas.

Before trial, and in accordance with local practice,[1] Falcon asked the court to certify a class with him as its representative. The class he sought consisted of all Mexican-Americans who were employed or who might have been employed by General in the North Texas area. (JA 45)[2]

The trial court after having heard arguments of counsel, and having considered the pleadings and briefs of the respective parties, entered a Pre-Trial Order on February 2, 1976, certifying the class to be made up of those employees who were employed and employees who had applied for employment in the Irving Division of General and no other division. (PA 48a)

Although the trial court did not hold a Rule 23 evidentiary hearing, the order entered by the Court on February 2, 1976, (following the Pre-Trial Conference of October 10, 1975) was clearly understood to be a provisional order. On March 11, 1976, in ruling on General's Motion To Reconsider Certification of a Class, the trial judge clearly advised the Defendant that it could raise the issue of the provisionally-certified class at any time during or after the presentation of class claims and evidence *at trial*. (PA 51).

At the liability stage (Phase I) Falcon introduced extensive testimonial and documentary evidence concerning his promotion discrimination claims both in a statistical form, and in testimony from the Equal Employment Opportunity Commission (EEOC) investigator, Robert Ray, on his investigation of the hiring practices and the discrimination in hiring of General.

[1]At the time this case was considered by the trial court the local practice was for the movant to address the class action issues in a Pre-Trial Conference. This was done on two occasions. (PA 48a, JA 213). Today the Local Rules for the Northern District of Texas, Rule 10.2 Civil Class Actions, govern the management of the case. Local Rule 10.2 is attached in Appendix A.

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[2]Citations to "PA" are references to the appendix to the Petition for Writ of Certiorari filed by General. Citations to "JA" are references to the joint appendix. Citations to Record "R", Vol C, pg. , are references to the trial transcript developed in Phase I, the liability aspect of the case. Citations to "R" Vol D, pg. are references to the trial transcript in Phase II, the damage phase.

(JA 70, 71; R. vol C, Pg. 22-26; pg. 29-33). Falcon further introduced evidence on the investigation performed by the EEOC for "like and related matters" with particular importance on General's recruitment/hiring practices which were investigated thoroughly by the EEOC. (JA 135, P1. Ex. 1; R 5, 11, Tab F).

At the conclusion of the Phase I (liability) portion of the case the trial judge specifically found that Falcon clearly and adequately "represents Mexican-Americans now employed and those who have applied for employment at the Irving facility" of General. (PA 40).

Both General and Falcon raised the class certification issue on numerous occasions:

1. Falcon's Motion To Amend The Class, (JA 213)
2. General's Motion To Reconsider Certification of a Class, (JA 49)
3. General's Motion For New Trial,
4. General's Motion To Amend Findings and Conclusions,
5. General's Motion To Alter or Amend Judgement, (PA52a)
6. General's Brief In Support of its Motion For New Trial, (JA 214)
7. Falcon's Motion To Amend Findings of Fact and Conclusions of Law, (JA 226)
8. Falcon's Motion For New Trial.

The trial court on all of these occasions carefully considered the class certification issue both prior to trying the liability portion of the case, and subsequent to the presentation of all evidence.

The trial court entered orders concerning the class certification issue on February 2, 1976 (PA 48a), March 11, 1976 (PA 50), on March 22, 1977 (JA 213), and finally, on October 31, 1978 when the trial court denied General's First Amended Motion To Alter or Amend the Final Judgment or in The Alternative Motion for New Trial. (PA 52)

SUMMARY OF ARGUMENT

A close analysis of *East Texas Motor Freight System v.*

Rodriguez and its relationship to Rule 23 reveals that neither the case law nor Rule 23 prohibit across the board attacks in Title VII employment discrimination litigation.

If across the board attacks are abolished, employee's claims will be so fragmented that effective application of Title VII will become impossible. The history of Rule 23 and the development and history of across the board attacks demonstrate that employment discrimination litigation under Title VII and the procedural aspects of Rule 23 are compatible. The continued existence of across the board attacks does not mean that the provisions of Rule 23 will be abused by employees because District Courts have the authority to follow the rule of reasonableness in certifying class actions.

Rodriguez does not contain any language, or any theory of law, that would prohibit across the board attacks in Title VII actions.

If discrimination exists, it exists against the class and the "same interest" and "same injury" referred to by this Court in interpreting Rule 23 should be viewed broadly and not in a restrictive manner. A narrow interpretation of the "same interest" "same injury" requirement would result in the elimination or serious fragmentation of class actions. A broad view could result in unmanageable litigation. The "same interest" "same injury" should be viewed under a reasonableness theory so that the necessary nexus of class actions is not convoluted.

Falcon was an adequate representative of the class because he actively prosecuted all aspects of the class claims. Falcon presented his claim, and he presented evidence and statistics on the class claims. There was no real conflict between Falcon and the class claims, nor was there any challenge to the competency of Falcon's attorneys in asserting the class claims.

It is clear that Congress intended for private Title VII litigants to be able to utilize broad based class actions in eradicating employment discrimination. The private plantiff serves, not only as a private attorney general, but also as a class representative to insure that employees are provided a work environment free from discrimination. By recognizing broad based class actions under Title VII Congress intended for the elimination of discrimination in the work environment to be given priority.

ARGUMENT

I. THIS COURT'S DECISION IN *EAST TEXAS MOTOR FREIGHT SYSTEM V. RODRIGUEZ* AND RULE 23 DO NOT PROHIBIT ACROSS THE BOARD ATTACKS IN TITLE VII CLASS ACTIONS.

The crux of this appeal centers around this Court's statement in *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 403, where the Court stated:

> As this court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.
>
> * * * *
>
> But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. 431 U.S. at 405.

These two statements have been of great concern to the Circuit Courts of our judicial system in dealing with the proper application of Federal Rule 23 in Title VII cases.

A. DEVELOPMENT AND HISTORY OF ACROSS THE BOARD ACTIONS

In order to properly understand the nature of across the board attacks in Title VII litigation, a brief review of the history of across the board attacks is necessary.

The concept of an across the board action, that is, an action challenging the wide range of employment practices resulting from a common discriminatory animus, originated in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). There, the Fifth Circuit reversed a trial court ruling that a black employee could only represent other discharged black employees. The court found such a limitation to be error since it was clear from the pleading that the plantiff's suit was an across the board attack on unequal employment practices alleged to have been committed by the company pursuant to its racial discrimination policy. 417 F.2d at 1124. The *Johnson* decision received continued support in Fifth Circuit Title VII litigation. In *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970), a group of black employees was permitted to maintain an across the board suit challenging hiring and internal personnel policies. In *Jack v.*

Linen Supply Co., 498 F.2d 122 (5th Cir. 1974), the Fifth Circuit held that a former employee could properly represent a class of present and future employees. In *Long v. Sapp*, 502 F.2d 34 (5th Cir. 1974), the Fifth Circuit, in reaffirming *Johnson, supra.*, held that a terminated employee could challenge racially discriminatory policies allegedly pervading all aspects of an employer's practices.

The across the board attack method was characterized as *pioneering* and received widespread, but not universal, support in other circuits. The across the board approach was approved by nearly every circuit.[3]

B. ACROSS THE BOARD SUITS ARE ALIVE AND WELL EVEN AFTER RODRIGUEZ.

General has argued that the continuing propriety of across the board class actions under Title VII was called into question by this Court in *East Texas Motor Freight System, Inc. v. Rodriguez, supra.* The confusion caused by *Rodriguez* centers around whether or not across the board suits remain appropriate in proper circumstances.

The factors favoring across the board suits still exist today. The fundamental thesis of these actions remains the existence of a discriminatory animus cutting across a variety of employ-

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[3] *Gray v. Greyhound Lines East*, 545 F.2d 176 (D.C. Cir 1976); *Lamphere v. Brown University*, 553 F.2d 714, 719 (1st Cir. 1977); *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Vulcan Society of Westchester County v. Fire Dept. of White Plains*, 82 F.R.D. 379 (S.D.N.Y. 1979); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3rd Cir. 1975), *cert. denied*, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 679 (1975); *Hackett v. McGuire Bros. Inc.*, 445 F.2d 442 (3rd Cir. 1971); *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 900 (5th Cir. 1978), *cert. denied* 439 U.S. 835, 99 S. Ct. 118, 58 L. Ed. 2d 131 (1978); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372-73 (6th Cir. 1977), *cert. denied*, 436 U.S. 946, 98 S. Ct. 2849, 56 L. Ed. 2d 787 (1978); *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976); *Crockett v. Green* 534 F.2d 715 (7th Cir. 1976); *Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977); *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 829-32 (8th Cir. 1977), *cert. denied*, 434 U.S. 856 (1976); *Reed v. Arlington Hotel Co.* 476 F.2d 721, 722-23 (8th Cir.), *cert. denied* 414 U.S. 854 (1973); *United States Fidelity & Guar. Co. v. Lord*, 585 F.2d 860 (8th Cir. 1978), *cert. denied*, 440 U.S. 913, 99 S. Ct. 1228, 59 L. Ed. 462 (1979); *Gay v. Waiters' and Dairy Luncheonmen's Union*, 549 F.2d 1330 (9th Cir. 1977); *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975).

ment practices. An across the board suit serves to vindicate class-wide rights on a class-wide basis. Not every Title VII class action is an across the board action. The propriety of across the board actions in approprite cases must be looked at on a *case by case* basis. Only where the Plantiff alleges that the particular discrimination suffered is due to an animus based on race, national origin, or sex which pervades a company's practices, and only where the plantiff presents sufficient proof of that allegation, should an action be certified as an across the board class action.

A careful review of previous cases by this court provides appropriate background for the history and development of across the board attacks and the relationship of that concept to Rule 23.[4] A holding that Rule 23 does not permit an across the board approach to employment discrimination class actions would establish a procedural barrier which would effectively limit the substantive rights of minority employees under Title VII.

An employee injured by his employer's practices ought to be able to represent other employees suffering employment discrimination eminating from the same source common to both the class representative and the class members. To hold otherwise would emasculate the principles of Title VII by requiring the fragmentation of employees' claims, all of which challenge an employer's discriminatory employment practices.

There is no language in *Rodriguez* which specifically prohibits an across the board attack. In *Rodriguez*, this Court stated that the Fifth Circuit plainly erred in certifying a class

> . . . for the simple reason that it was evident by the time the class reached the court that the named plantiffs were not proper class representatives under Fed. Rule Civ. Proc. 23 (a). 431 U.S. at 403.

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[4] *McCabe v. Atchison, Topeka, & Santa Fe Railway*, 235 U.S. 151 (1914); *Bailey v. Patterson*,. 369 U.S. 31 (1962); *Hall v. Beals*, 396 U.S. 45 (1969); *Schlesinger v. Reservist Committee to Stop the War*, 418 U.S. 208 (1974); *Sosna v. Iowa*, 419 U.S. 393 (1975); *Rosario v. Rockefeller* 410 U.S. 752 (1973); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980); and *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 401 (1977).

In effect, *Rodriguez* clearly held that a class representative must be a member of the class and in that case the potential class representatives were knocked out of the box before they came to bat. That is, the trial court made it clear that the plantiffs were not members of the class of discriminatees they purported to represent and at no time did the trial court afford them class representative status. This is a far cry from General's conclusion that *Rodriguez* outright prohibits across the board attacks.

The *Rodriguez* opinion contains no hint of disapproval of across the board Title VII challenges. The opinion underscores the inevitable conclusion that this Court was speaking solely to a situation in which timely steps t› obtain class certification had *not* been taken and, thereafter, it was established during the trial that the named plantiffs had suffered *no* injury. This Court went on to observe:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. 431 U.S. at 395.

This statement demonstrates that class suits involving classwide wrongs are still to be utilized in employment discrimination cases. The court went on to note that common questions of law or fact are typically present in discrimination cases, once again acknowledging that employment discrimination suits are classwide suits in many instances. The admonishment to the judicial system that careful attention must be paid to the requirements of Rule 23 was but a strong reminder that mere allegations of classwide discrimination is not sufficient to authorize indiscriminate across the board attacks. However, there is nothing in the *Rodriguez* opinion that clearly sets forth the position that across the board attacks are to be abolished.[6]

To the contrary, several commentators have observed that *Rodriguez* will have only limited precedential significance since this Court limited its holding to cases in which the named plantiff's individual claim failed prior to certification and the

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[6]Unlike General, Falcon does not believe that *Rodriguez* does or ought to dictate the outcome of his case. Nevertheless, should it become important the controlling factors in *Rodriguez* are clearly distinguishable from Falcon. See Appendix B.

holding did no more than reject an extreme application of the presumption in favor of certification. Note, "Limited Notice In Title VII Class Actions," 59 B.U.L. Rev. 661, 670 (1979) and Ruthergien, "Title VII Class Actions," 47 U. Chi. L. Rev. 688, 723 (1980).

C. THE RATIONALE OF GENERAL TELEPHONE COMPANY OF THE NORTHWEST V. EEOC HAS NO APPLICATION TO THIS CONTROVERSY.

The Fifth Circuit's holding in Falcon does not conflict with the decision of this Court in *General Telephone Company of the Northwest v. Equal Employment Opportunity Commission*, 446 U.S. 318 (1980).

In that case this Court was not concerned with across the board attacks or their use in employment discrimination cases. Rather, the issue, as stated by this Court was:

> The issue in this case is whether the Equal Employment Opportunity Commission (EEOC) may seek classwide relief under Section 706(f) (1) of Title VII of the Civil Rights Act of 1964 (Title VII) without being certified as a class representative under Rule 23 of the Fed. Rules Civ. Proc.

In *General Telephone Company of the Northwest* the EEOC's original complaint did not mention Rule 23 and the EEOC did not seek class certification under Rule 23. In very explicit language, this Court ruled that the EEOC may maintain a Title VII enforcement action without first obtaining class certification pursuant to Rule 23, 100 S. Ct 1708.

In passing on this issue, in dicta, this Court did observe several problems in dealing with Rule 23. It was noted that conflicts *might* arise between employees and applicants if they are competing for fringe benefits or seniority, 100 S. Ct. 1707. Under those circumstances, the same plantiff *might* not be able to represent different classes. The mere observation about problems that conceivably could arise in Title VII class litigation fails to rise to the status of a "conflict." There is simply no conflict between Falcon and *General Telephone Company of the Northwest.*

Falcon disagrees with General's suggestion that because there can *sometimes* be conflicts between employees and un-

successful applicants that employees should always be denied the right to be a representative of the class that includes applicants for employment. Any class that includes a large number of applicants or employees may present competition between class members for a limited number of positions. Falcon contends that this competition does not of itself amount to a "conflict" for purposes of certifying a class action. If it did, there could never be class actions where the number of class members exceeded the number of jobs or promotions available by the company. Indeed, this Court acknowledged in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772-774 (1976) and *Teamsters v. United States*, 431 U.S. 324, 361, 371-372 (1977), that once class liability is established and injunctive relief ordered, class actions become a series of individual requests for individual relief based on individual evidence.

If across the board attacks are to be abolished, some rationale, other than *General Telephone Company of the Northwest v. EEOC* must be utilized.

II. THE SAME INTERESTS AND SAME INJURY REQUIREMENT DO NOT PRECLUDE FALCON FROM REPRESENTING A BROAD CLASS OF MEXICAN-AMERICANS WHO HAVE SUFFERED FROM GENERAL'S COMMON DISCRIMINATORY PRACTICE.

If General's position that *Rodriguez* eliminates across the board attacks in Title VII litigation under Rule 23(a) is upheld it must be done by relying on the rather general language found in *Rodriguez* where this Court stated that a class representative must be a part of the class and possess the *same* interests and suffer the *same* injury as the class members. 431 U.S. at 403.

This Court's language referring to the "same" interests and the "same" injury must be analyzed carefully. First, that a class representative must be a member of the class and possess the same interests and suffer the same injury as class members has co-existed harmoniously with the across the board approach of Title VII challenges for far too long for it suddenly to acquire the novel interpretations urged by General, an

interpretation that forecloses any broad based race discrimination challenge. In 1974, this court decided *Schlesinger v. Reservist Comm. to Stop the War*, 418 U.S. 208 (1974), in which this Court said:

> To have standing to sue as a class representative it is essential that a plantiff be a part of that class, that is, he must possess the same interests and suffer the same injury shared by all members of the class he represents.

It was from *Schlesinger* that this court in *Rodriguez* quoted employing the phrase "possess the same interests and suffer the same injury." The terms "same interests" and "same injury" have been in existence since that case and they have never been thought to possess the narrow, stringent meaning General has sought to ascribe to them.

It is of little use to active litigants to treat phrases like "same interests" and "same injury" as abstractions. The real issue is what the phrases mean in concrete terms. Utilizing those terms, the phrases may be read either narrowly or broadly, depending on the reader. Read broadly, the phrases would permit anyone who has ever suffered discrimination to represent any other person who has ever suffered from discrimination at totally different times and places. This is clearly not the intent of the term "same interests" and "same injury" as used in *Rodriguez*. On the other hand, it is equally inappropriate to use a very narrow meaning to the terms "same interests" and "same injury." If a very narrow meaning is carried to an extreme, restrictive language would foreclose all class suits since it is obvious that no two employees ever suffer identically the same injury or are ever subjected to exactly the same set of discriminatory decisions although they may have the same interest. Falcon urges this Court to clarify the meaning of "same interests" and "same injury" to mean that the golden rule of reasonableness applies, as developed on a case-by-case basis under the watchful eye of a District Court.

It is possible in some circumstances to have a situation where two or more employees or certainly a set number of employees, that do not qualify under the numerosity requirement of Rule 23, to have a situation in which a single central authority imposes a discriminatory policy that affects each and every employee. This sameness would be the "same interests"

referred to by this Court in *Rodriguez*. The general universal application of the policy might make it the same whether viewed from the viewpoint of an employee seeking promotion or from the prospective employee desiring employment. Likewise, it is possible to construe a set of circumstances where a centralized management is attempting not to discriminate. However, in the interest of efficiency, there is autonomy granted to the supervisor of each of a number of departments, such as in this case. There may be discrimination present in one department while there is no discrimination in the other, such, as in this case, where the trial court determined that there was individual discrimination as to the promotion of Falcon but not as to the class of Mexican-Americans generally.

If Title VII cases are not dealt with on a case-by-case basis it will be impossible for Title VII litigants to ever fulfill the Congressional mandate. More importantly, and as is happening in some of the Circuits, as Title VII class suits come into general disfavor, employers quickly emphasize the dissimilarity of the claims in attempting to void the across the board attack and the importance of Rule 23(a). By pointing out the slightest factual variation of each claim under a general theory of the meaning of "same interest," "same injury," all employment discrimination classes will ultimately be merged into a class of one. Thus, there will be no Title VII class actions.

Likewise, under General's interpretation of "same injury" one employee discriminatorily rejected for promotion, such as Falcon, could not represent the claims of employees refused employment because different qualifications are required for promotion and different management considerations govern employment. Thus, a rejected applicant would not have been "injured" by discriminatory promotional practices in the management area. Under General's theory, Falcon would find himself eligible to represent only other groundsmen who had worked a sufficient amount of time to seek promotion to the management positions of the company.

The extension of General's position would undoubtedly lead to the necessity of having an employee experience the *exact* injury and have the *exact* interests in the contest of recruitment, hiring, discipline, promotion, discharge and other employment practices. Clever management personnel bent on

confining the permissable scope of representation to identical departments within the same facility, to identical positions that employees wanted to be promoted to, to particular practices complained of by minority employees, and to factual circumstances unique to the individual employee, would structure a system whereby an employee would never be able to attack system-wide employment discrimination policies. A shrewd personnel manager would attempt to confine the employee's permissable representation to the "injured" class of all Mexican-Americans in seeking promotion from the highest hourly paid position to a management paid position, only.

Moreover, an employer whose promotion practices discriminate against minorities may, for the same reasons, pursue a policy of discriminating against hiring a minority, and Courts would be derelict if they did not understand that the policies might well be shown to have stemmed from the same animus. See Justice Murnaghan's excellent analysis in his dissent in *Abron v. Black and Decker (U.S.) Inc.*, 654 F.2d 951, 955 (4th Cir. 1981).

It must be remembered that at all times all employees, whether seeking promotion or seeking employment, face the present or future danger than an employer's generalized discriminatory practices will affect their position in the company. Class action suits and across the board attacks, of course, are designed to achieve a common redress of individual grievances. Without class action suits only a few of those wronged will ever receive relief if each employee must file a separate site. The class module and the right to act in a representative capacity for a certified class should be interpreted in a wide ranging remedial fashion.

Falcon's contention is that the specific instance of discrimination reported by him is simply a single manifestation of racial and national origin discriminatory company-wide employment practices that infuse the working environment of all General's employees with discrimination. Without the national origin discriminatory denial Falcon would have had no Title VII claim. Falcon's interest is in being treated in all his employment's facets as an individual regardless of his national origin. Falcon's injury was being subjected to a national origin discriminatory employment environment and a set of employ-

ment practices which culminated in the denial of his promotion into management.

Falcon's interest and injury are viewed, as they must be, against the substantive legal background of Title VII, and when so viewed, Falcon and the members he represents possess the same interests and have suffered the same injury as the members of the class certified by the trial court.

General's position in attempting to label the injury suffered by an employee in a narrow sense and focusing upon the factual variation among discriminates (rather than upon the legal foundation upon which each individual claim is based) attempts to infuse an unworkable interpretation on the "same interest" and "same injury" requirement. Such an argument requires an exact factual similarity between injury suffered by a representative and injury suffered by each class members. General's position is patently incorrect. If that were the case, then Rule 23(c) (4) would not be necessary and provisions for subclassing would not serve as an acknowledgment that not every class member occupies the *identical* factual posture or shares the *identical* interest or suffers the *identical* injury as every other litigant in the case.

Rule 23 does not require that all questions raised in the litigation be identical. Rule 23 requires that there be a single issue common to all members of the class and therefore, that an employer who acts on grounds generally applicable to the class under Rule 23(b) (2), creates standing for a class representative even if his actions affect only one or a few members of the class. There has never been a requirement that every issue in a Title VII class suit affect every member of a class in precisely the same way, nor that every issue that affects the class representative or other class members be in precisely the same way.

To have such a narrow interpretation would undoubtedly frustrate the goals and purposes of Title VII. The test for Rule 23 standing to challenge promotion practices is not whether one has been denied a promotion, but whether one has been harmed by discriminatory promotion practices. Likewise, a similar test exists for those employees who were not hired. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365 (1977) where a non-applicant for a position was

allowed to share in the relief award, this Court stated:

> The effects of and the injury suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job application from those who are aware of it and are unwilling to subject themselves to the humiliation and certain rejection.

Although an employee may not have been denied employment, the employee may have suffered some particularized grievance plus the perpetration of a discriminatory employment environment coupled with the constant threat of being denied a promotion. This is the injury referred to in *Rodriguez* that links the representative employee such as Falcon, who was denied a promotion, to the other employees who were not hired and whose applications were not considered because they had the sameness quality that Falcon had, to wit, being a Mexican-American.

To accept General's interpretation of Rule 23(a) is to engraft a requirement on Title VII that one who is discriminated against in promotion (in order to be a class representative) must suffer the exact, precise injury of suffering discrimination in hiring. This has never been required under Title VII. It is enough to show legal injury to establish that one has been personally denied some employment benefit and either lived with a racially and national origin discriminatory employment environment or lived under the threat of a particular employment policy. Falcon in his across the board attack refuses to live under the threat of a particular employment policy and moves to eradicate all aspects of national origin and race discrimination.

In *Hall v. Werthan Bag Corp.* 251 F. Supp. 184, 186 (N.D. Tenn. 1966), Judge Gray accurately described the true nature of class discrimination:

> Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. This does not mean, however, that the effects of the discrimination will always be felt equally by all members of the racial class. For example, if an employer's racially discrimina-

tory preferences are merely one of several factors which enter into employment decisions, the unlawful preferences may or may not be controlling in regard to the hiring or promotion of a particular member of the racial class. But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all members of the class.

Falcon is entitled to work in an environment where he is free from racial discrimination. Falcon is not concerned only with his individual claim. Not only has the class been injured by the challenged practices, but so has he. If the aroma of discrimination and the ugly head of discriminatory practices arises, it may surface from several distinct, separate sources. If this is the case, then the class may not properly be as broad as the class representative desires. However, in the instant case, Falcon presented competent credible evidence that the foul aroma of discrimination permeated General's hiring practices. The proof established a single facility-wide discriminatory aroma at the Irving division in the failure to hire Mexican-Americans.

There is little doubt that an employee may bring a Title VII suit against an employer who creates a discriminatory work environment, regardless of whether the complaining employee lost any tangible job benefits as a result of discrimination. The EEOC, whose interpretation of Title VII is entitled to great weight, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) has consistently held that Title VII grants an employee the right to a working environment free of all racial intimidation. *(McDonald Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) in which this Court had a finding of racial discrimination against some employees, supports an inference of discrimination against similarly situated employees.

While Falcon may not have been denied tangible job benefits in that he was hired, it must be remembered that he was hired under a special program, and furthermore, although he was not denied tangible job benefits as a result of some of the

employment practices he challenges and he may not be entitled to monetary relief, he may still be entitled to an injunctive remedy for the denial of a work environment free of racial and national origin discrimination.

III. FALCON WAS AN ADEQUATE CLASS REPRESENTATIVE BECAUSE HE ACTIVELY PROSECUTED ALL ASPECTS OF THE CLASS CLAIMS.

First, Falcon presented direct and statistical evidence on his individual and the class promotional claims. (Pl. Ex. 20, JA 155). Subsection (5) of Pl. Ex. 20 clearly established that of 9 upgrades from Field to Management from July, 1973, to July, 1976, no Mexican-Americans or Black-Americans, male or female, were promoted. The trial court denied Falcon's class claims on promotion but sustained Falcon's individual promotional claim.

Second, although it is true that Falcon did not know any other Mexican-Americans when he started working except the two Mexican-Americans that started in the Operation Attainment Program with him, and that he did not know of any Mexican-Americans who applied for employment with General during the time he was employed, he did testify that he knew four Mexican-Americans at the time of trial. (R. Vol C. pg. 125).

Nevertheless, Falcon presented evidence of classwide hiring discrimination which was sufficient to convince the trial court that General discriminated in its hiring practices against Mexican-Americans.

Robert R. Ray, EEOC Investigator, who investigated the charge testified about his investigation concerning hiring discrimination (R. Vol. C pgs. 12, 13, 22-26 and 29-33).

Investigator Ray's Request For Additional Response for "Like and Related" Matters (JA 135 to 147, and is Pl. Ex. 1, 11, 11 [TAB F]) contains the request for information and employee statistical data utilized to indicate that hiring discrimination existed.

The statistical information utilized by the trial court is contained in Pl. Ex. 16 (R. vol. C 131, 131) JA 151; and Pl. Ex. 17 (R. Vol. C 131, 131) JA 152; and, Pl. Ex. 18 (R. Vol. C 131, 131) JA 153; and, Pl. Ex. 19 (R. Vol. C 131, 131) JA 154; and, Pl. Ex.

20 (R. Vol C 131, 131) JA 155; and Pl. Ex. 21 (R. Vol. C 131, 131) JA 156. These are explained by Falcon's counsel at R. Vol. C pgs. 132-142.

The telling statistics are located in Pl. Ex. 17 which clearly demonstrated that from 1972 through and including 1976, at the Irving Division, out of a total of 168 persons employed *no Mexican-American males were employed* (JA 152). Zero is simply not a figure that Falcon and the trial court could accept as being indicative of a strong affirmative action program by General.

Additional evidence as to the classwide pattern and practice of discrimination was exemplified by Pl. Ex. 22 (R. Vol. C 146, 146), Pl. Ex. 23 (R. Vol. C 146, 146), which are the General Services Administration letters to General dated April 10, 1975, and May 12, 1972, wherein the General Services Administration advised General of its deficiencies in hiring of Mexican-Americans, Black-Americans and female Americans.

Falcon submitted evidence in the form of interrogatories which were answered by General on January 22, 1976, ten days prior to the time that the trial court entered the pre-trial order (PA 48a) designating the case to proceed as a class action with Falcon as its representative.

Interrogatory #26 (R., Vol. C pg. 153; Pl. Ex. 25, pg. 34, [R. Vol. C 152, 152]) sets forth that a total of 210 applicants applied for the entry level position of lineman (designated line worker by the trial court) between the period of July, 1972 and July, 1975.

Interrogatory #27, (R. Vol. C pg. 153; Pl. Ex. 25 pg. 34 [R. Vol. C, 152, 152]) sets forth the fact that from July, 1972, through July, 1975, 17 white Americans were hired as linemen in the Irving Division.

Interrogatory #28, (R. Vol. C pg. 154; Pl. Ex. 25 pg. 34 [R. Vol. C 152, 152]) sets out that between July, 1972, and July, 1975, 17 Mexican-Americans applied for the entry level job of lineman.

Third, General made no challenge in the trial court to the competency (or lack of it) of Falcon's lawyers. Before the Fifth Circuit General argued that there was no evidence to show the qualifications of the attorneys who represented the class. However, as the Fifth Court noted, See: Footnote 8 (PA 14)

the competency of counsel can be judicially noticed, "as was apparently done in this case."[8] 626 F.2d at 376.

Fourth, nowhere in the record is there any evidence of any *real* conflict between Falcon's individual claim for promotion, Falcon's class claims as a representative of the class on class-wide promotional claims, or Falcon's representation as a class representative of applicants who suffered discrimination. The "potential conflict" that Falcon may have had in the trial court is evident less. In fact, the "potential conflict" referred to in Petitioner's Writ of Certiorari (pg. 15) has now been elevated to a *real* conflict in Petitioner's Brief (Pg. 7, 27, 28). However, there is no evidence of any such conflict in the record.

IV. CONGRESS INTENDED THAT BROAD BASED CLASS ACTIONS BE USED TO ENFORCE TITLE VII'S PURPOSES

The Congressional approach to Title VII has been to favor class action litigation and to allow a private litigant to be a "private attorney general."

By allowing a plaintiff broad Rule 23 standing to prosecute across the board challenges to an employer's discriminatory practices when the attack is on the basis that the practices are themselves across the board has been sustained on the theory that the main plaintiff is a private "attorney general" vindicating his interests and interests that are not solely his own. In *EEOC v. Associated Drygoods Corp.*, 449 U.S. 590 (1981), this

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[8]See Karro, *The Importance of Being Earnest: Pleading and Maintaining A Title VII Class Action For The Purpose of Resolving the Claims of Class Members*, 49 Fordham L. Rev. 904, 939-940 (1981): "In assessing the adequacy of the representation likely to be afforded class members, courts generally require no more than that the plaintiff's attorney be competent and that there be no obvious conflicts of interest within the class. Certification seldom has been denied due to inadequate representation because judges are perhaps unwilling to evaluate the performances of lawyers who appear before them. *The danger of conflicting interests among class members is generally discounted because such conflicts are assumed to be unlikely among persons seeking to end discrimination against themselves.* Thus, subdivision (a) (4) is often found to be satisfied for no better reason than that a plaintiff has hired a competent attorney and shares a common racial, sexual, or ethnic identity with class members."

Court held that Congress considered a Title VII charging party to be a private attorney general whose role in enforcing the ban on discrimination is parallel and similar to that of the EEOC. See also *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 338-39 (1980); *Otis v. Crown-Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968), (A Title VII suit where in plaintiff obtained an injunction and the court stated that a Title VII plaintiff who obtains an injunction does so not for himself alone, but also as a "private attorney general," vindicating a policy that Congress considers of the highest priority, relying on *Newman v. Piggy Park Enterprises, Inc.* 390 U.S. 400 (1968).

Congress further recognized that the relationship between a specific instance of discrimination and discriminatory employment practices generally call for broad remedial suits challenging the source of the discriminatory bias. The history of the 1972 amendments to Title VII clearly demonstrates a Congressional intent to allow broad remedial class action litigation to solve the discriminatory employment problems of our nation. The House Committee reporting on the 1972 amendments stated:

> Pattern or practice discrimination is a pervasive and deeply embedded form of discrimination. Specific arts or incidents of discrimination [within the Commission's jurisdiction] are frequently symptomatic of a pattern or practice which Title VII seeks to eradicate . . . Unrelenting broad-scale action against patterns or practices of discrimination is . . . critical in combatting employment discrimination. *H. Rep. No. 238, 92d Cong., 1st Sess. 14 (1971), reprinted in Senate Comm. on Labor and Public Welfare, 92 Cong. 2d Sess., Legislative History of the Equal Empl. Opp. Act of 1972*, at 74 (1972).

In 1972 when Title VII was amended, the House version of the bill prohibited class action lawsuits. Nevertheless, Congress declared that broad class actions were indispensable in freeing work places of racial discrimination. The Senate Committee in rejecting the House version stated:

> This section [authorizing the filing of discrimination suits] is not intended in any way to restrict the filing of class complaints. The committee agrees with the court that

> Title VII actions are by their very nature class complaints, and *that any restriction on such actions would greatly undermine the effectiveness of Title VII.*

S. Rep. No. 415, 92d Cong., 1st Sess. 27 (1971), reprinted in "Legislative History" at 436.

Subsequently, the Conference Committee, specifically refusing to adopt the House proposal limiting class actions and in accepting the Senate version, stated:

> . . . claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves consideration beyond those raised by the individual claimant.

Conf. Rep. (Senate) No. 92-681, reprinted in "Legislative History" at 1847.

Congress enacted the bill as recorded by the Conference Committee. 118 Cong. Rec. 7168, 7170, 7573 (1972).

The definition of the "same injury" when viewed in this manner governs the proper scope of the class and is consistent not only with the purposes of Rule 23, and with the substantive understanding of discrimination injury, but also with the history and purposes of Title VII of the Civil Rights Act. In the face of such explicit Congressional intent and endorsement of the role and importance of class actions in combatting employment discrimination, this Court should not adopt a procedural limitation that would destroy the utility of the class action as a device to effectuate Title VII's broad remedial purposes. *International Brotherhood of Teamsters vs. United States*, 431 U.S. 324, 348-49 (1977).

Technical limitations on representative status urged by General would literally drain the life out of Title VII litigation.

Acceptance of General's position is accepting the fact that there is a danger that *no* minority employee of General may be able to satisfy all of the requirements of Rule 23(a) and consequently General's broad discriminatory practices may go unchallenged. Long-term stamina indeed is required of Title VII litigants as the history of this case in the lower courts vividly illustrates. Without the backing of a comprehensive class, individual plaintiffs or their lawyers will find it difficult to muster the resources and incentives sufficiently to tackle industrial giants such as General. For example, the Plaintiff in

Falcon, the class members, and the attorneys, have received no injunctive or monetary relief even though the original EEOC charge was filed on October 17, 1972, alleging a discriminatory act of September 18, 1972, the Original Complaint being filed on April 3, 1975, and the District Court having entered final Judgment on October 28, 1978. In effect, to accept General's position will be to observe the classic application of the strategy utilized to deny minorities their rights, that is, the strategy of "divide and conquer."

If this Court accepts General's position on Rule 23(a), it will erect an unnecessary and uncalled for procedural barrier that can do nothing but frustrate the substantive objectives underlying Title VII class action lawsuits.

CONCLUSION

Falcon, and the class he represents, respectfully ask that the Fifth Circuit's Order remanding the case to the trial court be affirmed.

Respectfully submitted,

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Appendix

APPENDIX A

Rule 10.2: Civil Class Actions

All cases sought to be maintained as class actions under Rule 23 of the Federal Rules of Civil Procedure shall also be governed by the procedure set forth in this rule.

(a) *Form of Complaint.* Any complaint alleging a class action shall, in addition to the requirements of Local Rule 2.1(d) and (e) (3), bear in its title the legend "COMPLAINT-CLASS ACTION"; and in addition to the requirements of Rule 8(a) of the Federal Rules of Civil Procedure, shall contain within the complaint itself a separate heading entitled "Class Action Allegations."

(b) *Motions for Certification.* Within 90 days of the filing of a complaint alleging a class action, the attorney for the plaintiff shall move for certification. The motion for certification is subject to the procedure and all the requirements of Local Rules 5.1 and 5.3. In their briefs, counsel shall address themselves specifically to the following issues:

(1) a reference to the appropriate section or sections of Rule 23 of the Federal Rules of Civil Procedure under which the plaintiff claims that the suit is properly maintainable as a class action;

(2) specific factual allegations to justify the alleged class, including, but not limited to: the number or approximate number of class members; the definition of the class and any subclasses, in terms of a description of the members, distinguishing and common characteristics of class members, geography, time, common financial incentives, etc.; the questions of law and fact claimed to be common to the class; and, in actions claimed to be maintainable under Rule 23(b) (3), averments to support the findings required therein;

(3) the basis upon which plaintiff claims to be an adequate representative of the class, in terms of typicality of claims and fair and adequate representation of the class, and financial responsibility to fund the action;

(4) the basis for determining any required jurisdictional amount;

(5) the type and estimated expense of notice to be given to the members of the class, and the source of funds from which it will be paid;
(6) the discovery necessary for a hearing on the certification of the class and the estimated time required to conduct such discovery; and
(7) all arrangements for the payment of plaintiffs' attorney fees [See Rule 23(e)]

(c) *Discovery.* After commencement of an alleged class action, discovery shall proceed only as to facts relevant to certification of the alleged class. Although discovery relative to class certification may overlap with discovery on the merits, discovery of facts relevant to the merits of the lawsuit shall not begin until after the Court has ruled on the motion for certification.

(d) *Return of, or Response to, Notice.* When a civil action has been conditionally certified by the Court as a class action, and the Court requires that notice be given to the potential class members:
(1) if the potential class members number less than 1,000 members, the Court may require that return of response to notice be sent directly to the Clerk of the Court; but
(2) if the potential class members number 1,000 or more, the Court may require that response to notice be sent to a United States Post Office Box in the name of the Clerk of the Court, obtained at the immediate expense of the plaintiffs, to be treated ultimately as costs of action. In such case, the Court may specify an individual to collect, account for, and tabulate such returns or responses; such individual shall be paid a reasonable fee for his services as determined by the Court, which fee shall be an immediate expense of the plaintiffs, to be treated ultimately as costs of action.

(e) *Settlement or Dismissal of Class Action Allegations.* No class action shall be settled without Court approval. [See Rule 23(e)]. No class action allegation shall be withdrawn, deleted, or otherwise altered without Court approval.

APPENDIX B

COMPARISON OF *RODRIGUEZ* WITH FALCON

In order to exemplify the stark differences that exist between *Rodriguez* and this case, a detailed comparison and analysis of this Court's findings, holdings and the reasons thereof is in order.

There are eleven distinct areas where *Rodriguez* and Falcon differ significantly.

1. In *Rodriguez*, the plaintiffs did not move for class certification. In Falcon, the plaintiff moved for class certification and the court certified a class. Later the court certified a provisional class. The plaintiff moved on many occasions to expand the class. Throughout Falcon's stay in the trial court, the judge was bombarded on the class issue from both sides with appropriate legal arguments.
2. The trial court in *Rodriguez* did not certify a class. It was certified by the Fifth Circuit Court of Appeals. In Falcon, the trial court certified the class and subsequently limited the scope of the class. In addition, the trial court certified a provisional class advising the employer that the class issue could be raised after all of the evidence had been presented at trial.
3. In *Rodriguez*, the plaintiffs stipulated that they had not been discriminated against when they were first hired. In Falcon, the plaintiff has always contended that there was discrimination against Mexican-Americans in hiring and the plaintiff always contended that he was a proper representative of employees and Mexican-American applicants. (JA 13).

   It is noteworthy that the EEOC made a determination that General violated Title VII by failing to promote the plaintiff and by failing to hire Spanish Surnamed Americans *as a class*. (JA 132). This finding was made on January 29, 1974, prior to the time that the plaintiff instituted his classwide action.

   It is further interesting to note that the EEOC, under the standard of *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) issued a Request for Additional

Response Regarding "Like And Related" Matters with emphasis on recruitment/hiring and determined that General has established *a pattern or practice of discrimination* in recruitment and hiring. (JA 135-137).

4. In *Rodriguez*, the plaintiff stipulated one issue existed in the case: whether defendant's failure to consider plaintiff's line driver application violated Title VII and 42 USC . . . Section 1981? 431 U.S. at 399.
In Falcon, the plaintiff represented himself and the class of Mexican-Americans that had been employed or who sought employment with General. (JA 13, R. Vol. C pg. 2-3). Furthermore, the plaintiff pressed the classwide discrimination claims and agreed that he was a proper representative of the class of Mexican-Americans who were employed and who might have employed for employment at General. (R. Vol. C, pg. 4).
5. In *Rodriguez*, the plaintiffs confined their evidence and arguments at trial to their individual claims only, 431 U.S. at 400. In Falcon the plaintiff put on evidence about the plaintiff's claim. In addition, substantial evidence, including oral evidence by the EEOC investigator and statistical evidence on the hiring claim, and the discrimination evidenced therein, evidence on the promotional claim of the plaintiff himself and on a classwide basis, was presented. In addition, the statistical evidence that plaintiff put on was deduced from the discovery conducted by Falcon. This statistical evidence is supported by the source of the information. For example, Pl. Ex. 16 (JA 151) has as its source Defendant's Answer to Plaintiff's First Set of Interrogatories numbers 5 & 6. Likewise, Pl. Ex. No. 17 (JA 152), has in the original exhibit the supporting material produced by the defendant in response to interrogatories. Pl. Ex. 18 (JA 153), Pl. Ex. No. 19 (JA 154), and Pl. Ex. No. 20 (JA 155) have the supporting information attached. Falcon in Plaintiff's Exhibit No. 25 (Pl. Ex. 25, R. 152, 152) introduced into evidence pertinent answers from General's answers to Falcon's interrogatories. Finally, Falcon offered evidence concerning General's Affirmative Action Plan as Plaintiff Exhibit No. 30 (Pl. Ex. 30, R. 160, 160) and

demonstrated that the Affirmative Action Plan *allegedly* being utilized by General was not known to be in existence and was not utilized by management. This was established by the testimony of Mr. Goldston (R. Vol. C, pg. 219-20) and Mr. Sumner (R. Vol. C pgs. 239-40).

6. In *Rodriguez*, the trial court denied class certification and gave four reasons therefore, 431 U.S. at 400:
   (A) Plaintiffs' failure to move for class certification,
   (B) Plaintiffs' failure to offer evidence on the class action aspects of the litigation,
   (C) Plaintiffs' stipulated issue to be tried by the court, and
   (D) The evidence showed plainly that the plaintiffs did not really represent the position of the other employees.

   In Falcon, the trial court certified the class as has been noted above. Furthermore, the Plaintiff moved for class certification which was granted; put on evidence about the class action aspect of the litigation as regards to promotion and hiring; did not concentrate on his individual claim only; did not stipulate as to any issues harmful to the class and pressed the classwide issues of discrimination in hiring and promotion. There was no evidence to show that the Falcon was *not* a proper representative of the entire class of all Mexican-Americans employed or who might have sought employment at General.
7. In *Rodriguez*, the trial court held against the individual plaintiffs on their individual claims, 431 U.S. at 400. In Falcon the trial court held for the plaintiff on his individual claim of promotional discrimination, but held against the class of Mexican-Americans as to classwide promotion discrimination (PA 34a). The trial court held for the Plaintiff and the class he represented as to the hiring discrimination claims.
8. In *Rodriguez*, the trial court proceedings demonstrated that the plaintiffs were not members of the class they purported to represent, 431 U.S. at 403. In Falcon, the trial court proceedings made it clear that Falcon was a member of the class he purported to represent.

9. In *Rodriguez*, since the trial court found that plaintiffs lacked the qualifications to be hired as line drivers they suffered *no injury* as a result of the discriminatory practices. Therefore, plaintiffs were simply not eligible to represent a class of persons who *did suffer injury*. In Falcon, the trial court found he was qualified for the position he sought. Falcon thus *suffered injury* as a result of General's discriminatory practices and was eligible to represent the class of Mexican-American applicants *who did suffer injury*.
10. In *Rodriguez*, each plaintiff *stipulated* that he had *not been discriminated against with respect to his initial hiring*, 431 U.S. at 404. In light of such a stipulation, plaintiffs were hardly in a position to mount a classwide attack against hiring discrimination. In Falcon, no such stipulation is found. Falcon pressed the hiring classwide claims as well as the promotional claims.
11. In *Rodriguez*, this Court ruled that the plaintiffs would not fairly and adequately protect the interests of the class members because the plaintiffs failed to move for class certification prior to trial and the evidence showed the existence of a *real* conflict. Some potential class members had actually voted in a union meeting to reject the merger of city and line drivers. This was inconsistent with the plaintiffs' demands in their Original Complaint for such a merger. In Falcon, Falcon did fairly and adequately protect the interests of the class because Falcon moved for class certification and was successful in having a class defined. Furthermore, Falcon won the hiring discrimination issues on behalf of the class and his individual promotional claim. The evidence did not show any conflict between Falcon and members of the class he purported to represent.

It is Falcon's position that the foregoing analysis clearly demonstrates that his case is significantly different from *Rodriguez*. To utilize *Rodriguez* to deny class representation by Falcon of those class members who sought employment is to negate the purposes of Title VII, Rule 23, and the pre-trial and class action procedures developed in the district courts.

Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Petitioner,

v.

MARIANO S. FALCON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONER

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IN THE

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REPLY BRIEF OF PETITIONER

ARGUMENT

Both respondent Falcon and *amici* NAACP Legal Defense and Educational Fund, Inc. and Mexican American Legal Defense and Educational Fund, Inc. ("LDF") devote the bulk of their briefs to rebutting two arguments that General has not made: First, they say that General believes that it is *always* improper in employment discrimination actions for a district court to certify an "across the board" class encompassing both employees and unsuccessful applicants. Second, they accuse General of seeking an extreme rule requiring an exact factual identity between all members of a class.

Such characterizations could not be more wrong. General has consistently and carefully noted that the inclusion of employees and applicants within the same class does not necessarily violate rule 23[1] and has even de-

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[1] Brief of Petitioner at 12; Petition for Certiorari at 20.

scribed situations when such classes might be appropriate.[2] What General *has* argued can be simply restated: (a) there is no basis for a *presumption* that a current employee can represent a class of unsuccessful applicants simply because he shares a common national origin with them and (b) the certification of an across the board class *in this case* was clearly contrary to rule 23. Falcon and LDF have failed to rebut General's arguments, which are essentially endorsed by the Government. *See* notes 13, 29-30 *infra*.

I. THE TRIAL COURT AND COURT OF APPEALS PRESUMED THAT AN ACROSS THE BOARD CLASS WAS APPROPRIATE IN THIS CASE

Under the across the board approach, courts consider allegations that the purported class representative and the class have both suffered from an employer's discrimination against those of the same race, sex, or national origin essentially enough to support a broad class certification. *See* Brief of Petitioner at 10-12, 16, 21-22. Both Falcon and LDF now suggest that the trial court and the court of appeals did not utilize this presumptive approach, but instead carefully examined the facts of this case before concluding that rule 23(a) had been satisfied.[3] The record disproves these suggestions.

Despite General's repeated challenges to the trial court's class certification,[4] Falcon never introduced any evidence indicating that he could meet the requirements of rule 23(a) with regard to the applicant class. Instead, he argued that such evidence was unnecessary "where a plaintiff shows himself to be a member of a racial minority group and an employee of the defendant." (JA

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[2] *See* Brief of Petitioner at 29 n.54, 26 & n.48; Petition for Certiorari at 12 n.10.

[3] *See* Brief of Respondent at 2-3; Brief of LDF at 27-29.

[4] *See* JA 48; Tr. R. 371-72; R. 179, 188; R. 259, 269; R. 273; R. 295, 295; JA 214, 216-18; R. 586, 587, 598-99.

65-66.) In response, the district court held no evidentiary hearing, made no findings of fact regarding the requirements of rule 23(a), and gave no explanation in denying General's attempts to have the class decertified. The lack of support in the record for the class certification is precisely what one would expect from a trial court that saw no need for attention to the facts.

There is also no support for LDF's contention that the Fifth Circuit affirmed the class certification on any basis other than the fact that Falcon and the class both purportedly claimed employment discrimination because of the same national origin. The court of appeals expressly relied on the Fifth Circuit's "policy favoring 'across the board' Title VII class actions" [5] and "the rule in this Court that 'across the board' actions can still be brought." [6]

LDF, apparently hoping to write the opinion that the Fifth Circuit did not, speculates about some points of

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[5] PA 12 n.7 (quoting Satterwhite v. City of Greenville, 578 F.2d 987, 993-94 n.8 (5th Cir. 1978) (en banc), *vacated and remanded*, 445 U.S. 940 (1980)).

[6] PA 12 n.7. LDF implies that General misstates the Fifth Circuit's position in other cases and perceives an "imagined pattern of judicial abuse." *See* Brief of LDF at 18-19 & n.24. The issue before the Court is, of course, whether the Fifth Circuit erred in *this* case, not what it has done in other cases. However, the Fifth Circuit's reliance on the across the board approach in this case was not a fluke. The Fifth Circuit has relied upon the across the board approach in many cases to reverse a district court's failure to certify a class. *See, e.g.*, cases cited in Brief of Petitioner at 10 n.4, 11 n.7, 14 n.12; Walker v. Jim Dandy Co., 638 F.2d 1330, 1334-36 (5th Cir. 1981). And, contrary to LDF's assertion, the Fifth Circuit has relied upon the across the board approach in rejecting a defendant's challenge to a district court's class certification in at least two other cases. *See* Payne v. Travenol Labs., Inc., 565 F.2d 895, 900 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978); Carr v. Conoco Plastics, Inc., 423 F.2d 57, 63-66 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970). Finally, the Fifth Circuit did not reverse a district court's use of the across the board approach in any of the cases cited by LDF at pages 18-19 of its brief.

alleged overlap between Falcon and the applicant class that they suggest the Fifth Circuit may have considered. Brief of LDF at 27-29. But these supposed connections between Falcon's claims and the class claims are too general in nature to be of assistance in determining whether Falcon satisfied rule 23(a). When the factual underpinnings of their contentions are examined, it becomes clear that they do not enable Falcon to meet the common questions and typicality requirements of subsections 23(a)(2) & (3).

For example, LDF suggests that Falcon relied on "similar statistical evidence" to support his promotion claims and the class hiring claims. Brief of LDF at 28 n.37. In fact, the sole "statistical" evidence introduced by Falcon relating to promotion claims merely showed the numbers of Mexican-Americans, whites, and blacks promoted each year during the relevant period. *See* Pl. Ex. 20, JA 155, Tr. R. 131. There is thus no overlap with the applicant and hiring data offered on the hiring claims. They are "similar" only in that both numerically portray separate and distinct types of employment actions.

Similarly, LDF's contention that "first-line supervisors have a critical role in both the hiring and the promotion systems," Brief of LDF at 28, is so broadly stated as to be of no value in determining whether rule 23(a) is satisfied. At most, the record evidence cited by LDF suggests that construction department supervisors who participated in a 1968 affirmative action program interviewed minority applicants for the entry-level position *in the construction department.*[7] But there is no evidence

[7] LDF's contention is based solely on its citation of a special affirmative action hiring program that was in effect in 1968-1969 (JA 166-70.) This plan ceased three years prior to 1972, the earliest date covered by the hiring claims, and was limited to selections for a single position. (JA 170.) This evidence tells little about General's routine hiring practices during the relevant period, *see* note 10 *infra*, which the trial court defined as encompassing the period 1972—October 18, 1976. *See* JA 229, 234; PA 27 n.17.

that the construction department supervisors who were involved in the decision not to promote Falcon played any role in hiring applicants for jobs in any other departments.[8] Yet Falcon was allowed to represent applicants for *all* jobs—from clerical to managerial—not only applicants for construction department jobs. Moreover, the out-of-date evidence cited by LDF is not even sufficient to support an inference that the particular construction department supervisors involved with Falcon's promotion request made the decisions not to hire the few Mexican-Americans[9] who applied for jobs in the construction department during the relevant period.[10]

Moreover, even if it could be shown that those who decided whether Falcon would be promoted also were involved in the various decisions whether to hire the members of the applicant class, Falcon still would not be able to satisfy rule 23(a). The class hiring claims were based exclusively on a disparate impact theory and statis-

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[8] Indeed, the record suggests the contrary. The hiring decisions litigated at the Phase II trial that involved hiring in departments other than construction were made by the personnel department without any apparent involvement by construction or other supervisors. *See* Phase II Trial Record (Ph. II Tr. R.) at 19, 21, 36, 74-75, 96.

[9] Between July 1972 and July 1975, only 17 Mexican Americans applied for the Line Worker position, *see* Answer #28, Defendant's Answers to Plaintiff's First Set of Interrogatories, R. 86, Tr. R. 153-54; Plaintiff's Proposed Findings of Fact and Conclusions of Law, JA 194, 205. The Line Worker position is the entry level job in the Construction Department. Tr. R. 213-14.

[10] The record suggests that a change occurred in General's hiring procedures between 1968 and 1972. A 1972 letter from the General Services Administration states that responsibility for hiring practices was then centralized in General's Lewisville office, with only promotion decisions being made at Irving. *See* Pl. Ex. 23, JA 160-61, Tr. R. 145-46. Subsequently, hiring responsibility appears to have been returned to the Irving personnel department. *See* note 8 *supra*. The Phase II testimony did not deal with hiring procedures for construction department jobs.

tical evidence.[11] The identity and motives of those making the hiring decisions are irrelevant to the purely statistical question whether General's hiring process produced a disparate impact. *See* Brief of Petitioner at 25-26. Thus, even if the same persons had been responsible for hiring and promotion, proof of intentional discrimination against Falcon in promotions would not have helped establish disparate impact against the class.[12] Falcon's promotion claim was therefore not "typical" of the hiring claims, within the meaning of rule 23(a)(3).[13]

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[11] LDF, *not* Falcon, now asserts that the hiring claims were not based solely on a disparate impact theory. *See* Brief of LDF at 23-24. However, Falcon's Trial Brief states that his individual claim would be tried on the basis of the pattern of proof of disparate treatment outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), while the class hiring claims would be based on the contention that General had not employed "sufficient numbers of Mexican-Americans although there have been sufficient applicants." R. 173, 173-74. No argument was made that evidence of intentional discrimination in hiring existed. Nor could the relatively minor statistical hiring disparities even arguably support an inference of discriminatory intent. In Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977), this Court held that statistical evidence of disparate impact alone would not support an inference of intent unless the impact was "as stark" as that in Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (where all 200 affected by a statute were Chinese while 80 not covered by the statute were all non-Chinese) or Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (where city boundary change excluded all but four or five of city's 400 black voters but did not exclude any white voters).

[12] LDF's contention that the criteria used for hiring and promotions are both "subjective" also is irrelevant to the class certification decision, since different persons made hiring and promotion decisions and the class hiring claims were based exclusively on a disparate impact theory. Moreover, their only support is again the 1968-1969 affirmative action hiring plan. The record actually shows that most of the hiring decisions challenged at Phase II were based on objective criteria such as typing ability. *See* Ph. II Tr. R. 35, 56, 72, 115-16, 118-19, 179-83, 214.

[13] Neither LDF nor Falcon has taken issue with General's position that the typicality clause of rule 23(a)(3) requires that

II. THE ARGUMENTS ADVANCED IN SUPPORT OF THE ACROSS THE BOARD APPROACH ARE UNPERSUASIVE

Having argued that the lower courts did not rely upon the across the board approach, Falcon and LDF nonetheless articulate three reasons why reliance on that approach was proper. These reasons are either legally insufficient or inapplicable to the facts of this case.

A. Falcon Did Not Attack a Single Classwide Discriminatory Policy

Falcon argues that the certification of across the board classes is essential where there is a single discriminatory animus that manifests itself in a number of different employment practices. *See* Brief of Respondent at 5-7, 11-13. Similarly, LDF argues that plaintiffs should be able to challenge all employment practices undertaken pursuant to a common discriminatory policy in a unified class action. Brief of LDF at 14-15.

These arguments are irrelevant to this case. If a single policy of discrimination affects various employment actions it may be possible to challenge all its manifestations in a class action brought on behalf of all those affected by the policy.[14] But separate challenges to two or

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the class claim will be *at least* partially established if the named plaintiff prevails on his personal claim. The Government suggests a substantially similar standard—the proof of the named plaintiff's claim must be "substantially probative of the discrimination allegedly practiced against the class as a whole," Brief for the United States at 16-17—but suggests that it is required by the common questions clause of rule 23(a)(2) rather than the typicality clause. General agrees with the substance of the Government's position on this point, but believes that the issue is better considered under the typicality clause of rule 23(a)(3).

[14] For example, if an employer uniformly excluded minorities from all sales positions, the Title VII claims of minorities denied either a promotion or a direct hire into those positions would involve significant common questions and would probably be

more different policies *cannot* properly be brought in a single class action, as both Falcon and LDF now concede.[15] These concessions should be dispositive of this case, because it does *not* involve a challenge to the various effects of a single policy. Falcon attacked both hiring and promotion decisions of General, but he did not introduce any evidence showing that those decisions were made by the same individuals pursuant to any common, central policy.[16] He also did not present any evidence that the same criteria were used in hiring and promotions.[17]

"typical" of each other. In such a case, so long as the numerosity and adequacy requirements were met, rule 23(a) would not bar a class composed of both minority applicants and employees affected by this exclusionary policy.

This example illustrates why Falcon's assertion that General's construction of rule 23(a) would require precise factual identity between the representative and the class (Brief of Respondent at 14) is incorrect. Where factual variations do not significantly affect the proof required, they are irrelevant to typicality.

[15] Falcon concedes that if discriminatory practices arise from "several distinct, separate sources," then "the class may not properly be as broad as the class representative desires." *Id.* at 16. LDF concedes that "the scope of the class may be defined by the reach of the effects of the employer's policy of employment discrimination." Brief of LDF at 15.

[16] Indeed, Falcon's brief concedes the decentralized way General's employment decisions were made for Irving. *See* Brief of Respondent at 12.

[17] Given this lack of any overlap between the evidence relevant to Falcon's promotion claims and the evidence relevant to the hiring claims of the class, LDF's arguments concerning possible situations in which the same evidence might support a theory of disparate treatment or disparate impact (Brief of LDF at 23-24) are wholly irrelevant to this case. Similarly, LDF's assertion that General's construction of rule 23 would bar the civil rights class actions cited with approval in the 1966 Advisory Committee Notes to rule 23(b)(2), *see* Brief of LDF at 16-17 & n.21, is misplaced. Each of the cases cited by the Advisory Committee involved a challenge to a *single* governmental enactment or policy that affected members of the class somewhat differently.

B. The Allegation That Falcon Has Been Injured by a Discriminatory Work Environment Was Not Alleged in the Complaint, Is Not Supported by the Record, and Is Not Relevant to Whether He Is an Appropriate Class Representative

In this Court, Falcon apparently asserts, for the first time in the ten-year history of this case, that he has been injured by General's hiring practices because they deprived him of the opportunity to associate with more Mexican-Americans while at work. *See* Brief of Respondent at 15-16.

There are two basic flaws with this injury to associational rights argument. The initial difficulty is that it is not relevant to this case. Falcon did not allege any such injury in his complaint (JA 13) or during trial. Moreover, there is no evidence in the record that he suffered any injury as a result of being deprived of the right to associate with more Mexican-American employees.[18] Without a properly pleaded allegation of "actual" and "genuine" associational injury, supported by appropriate proof, Falcon cannot now speculate about such injury to make up for the defects in his ability to represent a class of applicants.[19]

Second, even if Falcon had alleged and proved that he had personally suffered an associational injury from Gen-

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[18] Falcon did not request any relief at Phase II to compensate him for any purported loss of associational opportunities.

[19] *See* Havens Realty Corp. v. Coleman, 50 U.S.L.W. 4232, 4235-36 (U.S. Feb. 24, 1982); *id.* at 4237-38 (Powell, J., concurring); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 115 & n.31 (1979). It is too late for Falcon to amend his complaint pursuant to rule 15 of the Federal Rules of Civil Procedure to add allegations of associational injury. Such an untimely amendment would unfairly prejudice General by forcing it to attempt to reconstruct Falcon's social relationships and interest in associating with other Mexican-Americans almost a decade ago, long after memories have faded and witnesses have become unavailable. Where such prejudice would result, amendment is not permitted. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330-31 (1971); 3 Moore's Federal Practice ¶ 15.08[4], at 15-91 to 15-99 (1980).

eral's hiring practices, he could not represent a class of unsuccessful applicants. Such proof might establish the existence of personal standing under article III,[20] but the mere fact that a plaintiff has personal standing does not mean that he is also an appropriate class representative under rule 23.[21] While personal standing to challenge a practice may arise from *any* concrete injury caused by that practice, this Court has held that a proper class representative must be a member of the class that he seeks to represent and therefore must "possess the same interest and suffer the same injury" as all other class members. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). But the injury suffered by one who has merely been deprived of associational opportunities is *not* the "same injury" as that suffered by one who has been directly denied employment.[22]

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[20] While it is not necessary for the Court to reach this issue, an employee who suffers genuine, concrete injuries from the hiring process of an employer may be a "person aggrieved" under Title VII, 42 U.S.C. § 2000e-5(f)(1)(A), who would have standing to challenge those hiring practices. *See, e.g.*, EEOC v. Mississippi College, 626 F.2d 477, 481-82 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 3143 (1981); Waters v. Heublein, Inc., 547 F.2d 466, 469-70 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977).

[21] *See* United States Parole Comm'n v. Geraghty, 445 U.S. 388, 405-07 (1980); Brief of Petitioner at 14-15 n.15. Thus, for example, while members of one race may have article III standing to challenge racially exclusionary practices directed at members of another race, *see, e.g., Havens Realty, supra*; cases cited in note 20 *supra*; many courts have held that rule 23 does not permit a person of one race or sex to litigate a Title VII case on behalf of a class whose members are of a different race or sex. *See, e.g.*, Bartleson v. Dean Witter & Co., 86 F.R.D. 657, 668-70 (E.D. Pa. 1980); *see also* Brief of LDF at 27 n.33 (rule 23 "may well preclude" black males from representing white females).

[22] As this Court recognized in *Havens Realty*, the associational injury of one injured by exclusionary practices directed at others is "indirect," while those actually the subject of the exclusionary practices suffer a "direct" injury. *See* 50 U.S.L.W. at 4235.

This difference is crucial for class certification purposes. The very structure of rule 23, particularly in its membership, typicality, and adequacy of representation requirements, evidences the draftsmen's intent to ensure such a close community of interest between the named plaintiff and the class that representative litigation would be fair.[23] Associational injury may give an individual plaintiff a sufficient stake in a controversy over hiring to press *his own* claims, but that indirect injury is too attenuated to permit his acting as the representative of disappointed applicants, whose alleged injuries from the hiring process are much more "direct" and substantial.[24] Therefore, an employee alleging associational injury because others of his race, sex, or ethnic group are not hired is not a member of the same class as those rejected for employment and cannot represent them under rule 23(a).[25]

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[23] *See* Brief of Petitioner at 16-20, 31-37.

[24] *See* Williams v. Wallace Silversmiths, Inc., 75 F.R.D. 633, 635 (D. Conn. 1976) (associational interests of employees are "too general in nature" to permit them to represent unsuccessful applicants), *appeal dismissed*, 566 F.2d 364 (2d Cir. 1977); *cf.* Thomas v. Ford Motor Co., 396 F.Supp. 52, 60-62 (E.D. Mich. 1973), *aff'd mem.*, 516 F.2d 902 (6th Cir.), *cert. denied*, 421 U.S. 988 (1975) (one with associational injury cannot represent class with direct injuries).

[25] The other requirements of rule 23(a) also are not met in such cases. Adequacy of representation would be lacking because of the obviously differing levels of self-interests in pursuing a challenge to the defendant's hiring practices. Inadequacy of representation is particularly obvious where, as here, an employee appends an associational injury claim—and the concomitant assertion of a right to represent a class of applicants—to an unrelated personal promotion claim in which he does have a direct interest. In such cases, the inference is strong that the employee seeks to represent the class in order to buttress his bargaining power with regard to his personal promotion claim. Moreover, since the employee has standing to litigate only those hiring practices that affect the composition of that portion of the employer's workforce with whom he comes into contact, *see Havens Realty Corp.*, *supra*, 50 U.S.L.W. at 4236; his associational claim would not be typical of claims involving hiring practices that affect other areas of the plant or facil-

C. Neither the Policy Considerations Nor the Legislative History Relied Upon by Falcon and LDF Support the Across the Board Approach

Falcon and LDF heavily rely on the legislative history of the 1972 amendments to Title VII to justify the across the board approach utilized by the Fifth Circuit in this case. The basic flaw in their use of these legislative materials is that they attempt to convert statements that generally approve of the use of class actions in Title VII suits into a congressional endorsement of the Fifth Circuit's presumption that sweeping across the board Title VII class actions are proper.

Clearly, the 1964 Congress did not intend that special rules were to apply to Title VII suits.[26] Moreover, the 1972 Congress did not change this original understanding. Falcon's contrary reading of the 1972 legislative history is primarily based on a quote from a 1971 House Committee report that, as elided and rearranged, suggests approval of "broadscale" action by private plaintiffs against "pattern or practice" discrimination. *See* Brief of Respondent at 20. In fact, when the undoctored quote, as set forth in the Addendum, is examined, it can readily be seen that the Committee was not addressing the scope of private Title VII actions at all, but was instead explaining why authority to bring pattern or practice suits should be transferred from Justice to the EEOC.

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ity. Similarly, the substantial differences between the elements of an associational claim and a hiring claim (*e.g.*, the necessary proof of injury) could also necessitate a finding of lack of typicality.

[26] *See* Brief of Petitioner at 41-42. An interpretative memorandum on Title VII, prepared by Senators Clark and Case, floor managers of the 1964 version of Title VII in the Senate, stated, "The suit against the respondent, whether brought by the Commission *or by the complaining party*, would proceed in the usual manner for litigation in the Federal courts." 110 Cong. Rec. 3044 (1964) (emphasis added).

LDF's reading of the 1972 legislative history is equally insupportable. It argues that Congress "indicated its approval" of the Fifth Circuit's opinion in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969) (which pioneered the across the board approach to Title VII class actions), by rejecting the House-passed amendment to Title VII that would have overruled the Fifth Circuit's prior holding that each class member need not file individual administrative charges with the EEOC.[27] Brief of LDF at 11-12. But the 1972 legislative history contains *no* discussion of either the across the board approach or of the Fifth Circuit's decision in *Johnson v. Georgia Highway Express*. There is therefore no basis for LDF's assertion that the 1972 Congress approved the *Johnson* case or the across the board approach.[28]

Finally, Falcon and LDF argue that the across the board approach should be approved because it effectuates the important public policy against discrimination. Actually, as General pointed out in its initial brief, relaxing the requirements of rule 23 may well undercut the purposes of Title VII, not further them. *See* Brief of Petitioner at 30-40. But this Court need not be drawn into a dispute over whether relaxation of the requirements of rule 23 in Title VII actions would on balance further or impede the public policy against discrimination. Resolution of such policy arguments concerning class actions is for Congress, not this Court. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978). Since there is no "direct" or "clear" expression of congressional intent to

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[27] *See Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968).

[28] Amendment or reenactment of a statute does not indicate congressional approval of a prior judicial opinion unless that opinion and the legal issues involved were brought to the attention of Congress. *See, e.g.*, Barrett v. United States, 423 U.S. 212, 223-24 (1976); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 240-42 (1970); Helvering v. Hallock, 309 U.S. 106, 119-22 (1940).

exempt Title VII class actions from the ordinary operation of rule 23, that rule is fully applicable to Title VII class actions. *See Califano v. Yamasaki*, 442 U.S. 682, 700 (1979).

III. RESPONDENT HAS FAILED TO DISTINGUISH THIS COURT'S DECISIONS IN RODRIGUEZ AND GENERAL TELEPHONE CO.

Falcon urges eleven factual distinctions of *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).[29] But *Rodriguez* is clearly applicable to the present case. It rejected the core notion underlying the Fifth Circuit's across the board approach—that allegations of racial or ethnic discrimination provide a sufficient basis for an across the board class. *See id.* at 405-06; Brief of Petitioner at 12-13.

Falcon also fails to distinguish this Court's statement in *General Telephone Co. v. EEOC*, 446 U.S. 318, 331 (1980), that where "conflicts might arise . . . between employees and applicants . . . who will, if granted relief, compete with employees for fringe benefits or seniority," then the "same plaintiff could not represent these classes." General has shown that there is a similar conflict of interest in this case because Falcon would be in direct competition with members of the applicant class for the promotions earmarked for Mexican-Americans and other minorities under General's affirmative action plan and the injunctive relief proposed by Falcon. In response, Falcon argues that because competition for jobs is always present in large class actions, it cannot amount to a "conflict" that would bar class certification, else classes would seldom if ever be certified.[30]

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[29] The Government advances similar distinctions in arguing that *Rodriguez* does not "control" this case. *See* Brief for the United States at 16 n.13.

[30] *See* Brief of Respondent at 9-10; Brief of LDF at 25; Brief for the United States at 19 n.17.

Falcon misses the point of the Court's logic in *General Telephone*. While there will, of course, always be competition for limited job or promotion vacancies, in most instances a current employee will be indifferent to whether he competes for those limited vacancies with members of his own race or with members of another race. But in the situation identified by the Court—where a remedial award of retroactive seniority to rejected applicants of the same race as the current employee may injure the employee—the employee has an incentive to see to it that those applicants do not prevail. Similarly, here, because of the existence of promotion slots earmarked for Mexican-Americans and other minorities, Falcon had an analogous incentive to prefer that non-minorities, rather than the Mexican-American applicants he sought to represent, enter the General workforce.[31] This incentive was in direct conflict with the interest of the applicant class in obtaining employment with General. Accordingly, under *General Telephone*, he could not properly be certified as the class representative.

IV. THE WRIT OF CERTIORARI WAS NOT IMPROVIDENTLY GRANTED

Perhaps recognizing the difficulty of sustaining the lower court's decision on the record in this case, LDF contends that the writ of certiorari was improvidently granted either because the case is not ripe for review or because the issue of whether it is a proper class action "may well be moot." Neither of these contentions has any merit.

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[31] Lack of typicality makes the conflicting interests important. Because Falcon's promotion claim was not typical of the class hiring claim, it was possible for him to prevail on his own claim without also advancing the class claims. In contrast, where typicality is present, the class representative cannot prevail on his own claim without also advancing the class claims.

LDF asserts that the status of the applicant class will not be ripe for this Court's review until there has been a final judgment on the merits. In fact, as General discussed in its Petition for a Writ of Certiorari, this Court has frequently reviewed class certification issues prior to the entry of a final judgment because such issues are fundamental to the further conduct of the case.[32]

LDF's mootness contentions are more convoluted but are no more persuasive. First, they assert that the case may be moot because only thirteen Mexican-Americans filed proof of claim forms at the Phase II trial and this would not satisfy the numerosity requirement of rule 23(a)(1). Brief of LDF at 5. Numerosity is not at issue in this case. *See* Brief of Petitioner at 9 n.3. The numerosity requirement is properly judged, not by the number of Phase II responses, but by the size of the class to whom notices are sent, less the number of those who affirmatively opt out or whose notices are undeliverable.[33] Notices were sent to more than 120 class members[34] and the record does not indicate that any notices were not delivered or that any class members opted out.

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[32] *See* Petition for Certiorari at 20-23; *see, e.g.*, cases cited at *id.* at 23 n.33; Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). LDF's prediction that on remand the district court "may and indeed should reconsider whether Rule 23(a) is satisfied," Brief of LDF at 4-5 & n.2, is unrealistic to say the least. After the Phase II trial, the district court denied General's final motion to reconsider the class certification. (PA 52.) Since then, the only relevant development has been the Fifth Circuit's affirmance on the ground that "the trial court acted correctly when it certified Falcon's claim on behalf of these other plaintiffs." (PA 14.) *See* Bolton v. Murray Envelope Corp., 553 F.2d 881, 883 (5th Cir. 1977) (prior appellate holding that class was properly certified is law of case and cannot be changed on remand).

[33] *See* Rule v. International Ass'n of Ironworkers, 568 F.2d 558, 563-64 (8th Cir. 1978).

[34] *See* JA 227; R. 214, 265-66.

To bolster its mootness argument, LDF also suggests that review of the class certification is "unnecessary to the just disposition" of hiring claims because the few claimants could intervene or be joined as parties. Brief of LDF at 6-7. LDF in effect is inviting the Court to render the provisions of rule 23(a) unenforceable by defendants. If intervention or joinder can cure a trial court's erroneous class certification, then the certification decision is effectively nonreviewable. The unfairness of LDF's position is apparent: Where subsections 23(a)(2), (3), or (4) are not met, putative class members can avoid the risks of initial intervention or joinder by allowing the representative to litigate on their behalf. If he loses, they can collaterally attack the adverse judgment.[35] However, if he wins and the defendant successfully attacks the class certification on appeal, they nevertheless can gain the benefits of his victory by intervening or joining. This "no-loss proposition" frustrates the purpose of the 1966 amendment of rule 23.[36]

The decisions of this Court prohibit such a course of action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), states that it is improper for there to be "a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained." *Id.* at 177-78. Similarly, in *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977), the Court noted that even after a trial on the merits a decision that the named plaintiff could not satisfy rule 23(a) would require dismissal of the class allegations unless "the initial certification [of the class] was proper and decertification not appropriate." *Id.* at 406 n.12; *see* Brief of Petitioner at 46 n.106.

In any event, the procedural devices suggested by LDF would not be available to the members of the applicant class. Insofar as the record shows, none of them has

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[35] *See* Brief of Petitioner at 35-37.

[36] *See id.* at 36.

complied with Title VII's charge filing requirements, 42 U.S.C. § 2000e-5(e) (1976). Some courts have allowed intervention by noncharging parties, but only where the intervenors' claims are "essentially identical" to the claims of the plaintiff who has complied with the administrative requirements[37] and the intervenors and the original plaintiff are members of the same class.[38] Because of the complete lack of evidentiary overlap between Falcon's promotion claim and the applicants' claims, and the differing legal theories underlying these claims,[39] those conditions are not met here and intervention would not be permitted.

LDF's suggestion that the applicant claimants could be joined as parties also has no merit because the applicants could not meet the requirements of rules 19 and 20 for joinder.[40] Even if joinder were permitted, the ap-

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[37] *See* Crawford v. United States Steel Corp., 660 F.2d 663, 666 (5th Cir. 1981); Foster v. Gueory, 655 F.2d 1319, 1322-23 (D.C. Cir. 1981); Dickerson v. United States Steel Corp., 582 F.2d 827 (3d Cir. 1978); Dalton v. Employment Security Comm'n, 28 Fair Empl. Prac. Cas. 178, 179-80 (4th Cir. 1982). Where an intervenor seeks to become a substitute class representative, he must have filed a Title VII charge and the time he filed his charge is used in defining the class he represents. *See* Inda v. United Air Lines, Inc., 83 F.R.D. 2, 8, 10 (N.D. Calif. 1979).

[38] *See, e.g.*, Wheeler v. American Home Products Corp., 582 F.2d 891, 897 (5th Cir. 1977); Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876, 882-83 (8th Cir. 1977).

[39] The absence of common questions would in itself bar intervention under rule 24. *See* Dickerson v. United States Steel, *supra*, 582 F.2d at 831-32.

[40] Rule 19 would not be satisfied because complete relief can be afforded to Falcon without joinder of the applicants and because the disposition of Falcon's claim and the dismissal of the class allegations, without prejudice to class members' right to bring individual actions, would not impede their ability to protect their interests. Rule 20 would not be satisfied because the hiring claims did not arise out of the same transaction or occurrence as Falcon's claim, and because these claims do not involve any common questions of law or fact. *See* Smith v. North Am. Rockwell Corp., 50 F.R.D. 515, 522 (N.D. Okla. 1970).

plicant's Title VII claims would nevertheless be barred by their failure to file a charge with the EEOC.[41]

CONCLUSION

For the reasons stated here and in General's opening brief, the judgment of the court of appeals should be reversed and the case remanded to the district court with instructions to dismiss the class allegations from the complaint.[42]

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[41] LDF's suggestion that joinder of the applicant claimants would "relate back" to the date of Falcon's initial pleading and would thus not be barred by the statute of limitations, *see* Brief of LDF at 7 & n.11, is thus beside the point. In any event, rules 15(c) and 17(a), cited by LDF, are inapposite. Rule 15(c) is not applicable to any change in plaintiffs. *See* Fed. R. Civ. P. Advisory Comm. Notes, 39 F.R.D. 69, 83-84 (1966). Rule 17(a) is applicable to a change in plaintiffs only where there has been an "understandable mistake" as to the identity of the real party in interest. *See id.* at 85. Rule 17(a) is thus not applicable to a situation where absent class members seek to be joined after it is determined that the original class representative cannot satisfy rule 23(a). *See* Hobbs v. Police Jury, 49 F.R.D. 176, 180 (W.D. La. 1970) (3 judge court).

[42] No remand for further findings is necessary. Where the record before the Court reveals that the non-prevailing party cannot meet his burden of proof even upon application of correct legal standards, a remand for further findings is futile. *See* Brown v. Illinois, 422 U.S. 590, 604 (1975); *see also* Brief of Petitioner at 46 n.106. The present record amply demonstrates that Falcon's disparate treatment in promotions claim is not typical of, and does not involve any questions in common with, the disparate impact in hiring claims of the class and that Falcon is not an adequate class representative because of the conflict of interest between him and the class.

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April 1982

Appendix

ADDENDUM

Unrelenting broad-scale action against patterns or practices of discrimination is, however, critical in combatting employment discrimination. *The Committee believes these powers should be exercised by the Commission* as an integral and coordinated part of the overall enforcement effort.

Pattern or practice discrimination is a pervasive and deeply imbedded form of discrimination. Specific acts or incidents of discrimination within the Commission's jurisdiction are frequently symptomatic of a pattern or practice which Title VII seeks to eradicate. The Commission has the basic responsibility to achieve the objectives of Title VII. Since the Commission is being vested with cease and desist enforcement authority, it is imperative that it be empowered also to deal with "pattern or practice" discrimination in order to deal comprehensively with systemic discrimination.

The Committee feels that the transfer of the "pattern or practice" jurisdiction to the Equal Employment Opportunity Commission would eliminate overlapping jurisdictions and unnecessary duplication of functions. It would promote uniformity in development of law, goals, policies, and procedures and promote economic use of governmental resources. "Pattern or practice" jurisdiction in the Department of Justice was justified at a time when the Commission did not have its own enforcement powers. However, with the acquisition of cease and desist powers, the Commission's operations are sufficiently broad to encompass "pattern or practice" violations as well as individual complaints of discrimination.

The Commission is best able to determine where "pattern or practice" litigation is warranted. It has access to the most current statistical computations

and analyses regarding employment patterns and has the most extensive expertise in dealing with employment discrimination.

H.R. Rep. No. 238, 92d Cong., 1st Sess. 14 (1971), *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 74 (1972) (emphasis added).

Amicus Brief

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No. 81-574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Petitioner,

v.

MARIANO S. FALCON,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

The Equal Employment Advisory Council (EEAC), with the written consent of the parties,[1] respectfully submits this brief as Amicus Curiae in support of Petitioner, General Telephone Company of the Southwest.

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* ("Title VII" or "the Act"). As a significant part of its activities, EEAC has participated as amicus curiae in major Title VII cases, including many before this Court and the courts of appeals involving Title VII class action issues. *See, e.g., General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980); *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 413 U.S. 395 (1977); *Hill v. Western Electric Company*, 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); *Scott v. University of Delaware*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); *Satterwhite v. City of Greenville*, 578 F.2d 987 (5th Cir. 1978) (*en banc*), *vacated and remanded*, 445 U.S. 940 (1980).

This case concerns whether a plaintiff-employee who alleged discrimination under Title VII with respect to job promotion was properly certifiable as a representative of a class of alleged discriminatees with respect to job hiring. Because of the major investment of resources typically required in the defense of Title VII class action

suits, EEAC's interest in this case is substantial. EEAC, and its members, are concerned that overbroad Title VII class certifications, violative of Rule 23 of the Federal Rules of Civil Procedure, will seriously overburden limited judicial resources, undercut the rights of corporate defendants to proper notice and the opportunity to conciliate, and interfere with the efforts of legitimate Title VII plaintiffs to obtain relief.

STATEMENT OF THE CASE

The plaintiff was hired by the Irving, Texas division of General Telephone Company of the Southwest ("General Telephone") in July, 1969. Subsequently, and after applying for but not receiving a promotion, he filed a complaint with the EEOC charging that General Telephone discriminated against him on the basis of national origin in the area of promotions. Cert. Pet. 5a.[2] The plaintiff thereafter filed an individual Title VII suit and a class action alleging that General Telephone not only discriminated in its promotions but that it also discriminated against a class on the basis of national origin in its hiring policy.

With respect to the class suit, the district court certified a class that included all Mexican-Americans currently employed and those who had applied for employment at General Telephone's Irving facility, with the plaintiff as its sole representative. *Id.* at 6a. After trial, the district court ruled that General Telephone had discriminated against the plaintiff in promotions, that it had discriminated against the class with respect to hiring, but that it had not discriminated against the class with respect to promotions. *Id.* at 40a.

On appeal, the Fifth Circuit Court of Appeals affirmed the trial court's ruling with respect to the plaintiff's in-

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[2] References are to the opinions and the judgments of the courts below, which have been reproduced in the Appendices to the Petition for Certiorari.

dividual promotion claim, but remanded the issue of the class action hiring claims to the district court for further findings of fact. *Id.* at 21a, 31a.[3] Among the issues General Telephone raised on appeal was that the named plaintiff had not met all the requirements of Rule 23(a) for class certification. It was argued that under this Court's ruling in *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977), the named plaintiff, who was complaining of discrimination with respect to promotion, could not represent a class complaining of discrimination with respect to hiring. Cert. Pet. 11a. The Fifth Circuit upheld the trial court's certification, however, as a permissible "across the board" attack. Cert. Pet. 12a. "This Court's traditional application of a liberal standard in this area," the Fifth Circuit declared, "is a reflection of our understanding about the realities of Title VII litigation." Cert. Pet. 17a. The court of appeals thus ruled that an employee complaining of one employment practice could represent another complaining of another practice, "if the plaintiff and the members of the class suffer from essentially the same injury," here national origin discrimination. Cert. Pet. 13a.

Before the district court could address the case on remand, this Court, upon a petition for a writ of certiorari filed by General Telephone, vacated the judgment of the Fifth Circuit, and remanded the case to the court of appeals for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981).[4] 101 S. Ct. 1752 (April 6, 1981).

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[3] The Fifth Circuit issued the remand in order to obtain from the district court a more specific evaluation of the statistical data introduced by the parties. Cert. Pet. 28a.

[4] In *Burdine*, this Court held that in employment discrimination cases involving allegations of disparate treatment, the defendant may carry its burden of rebutting the prima facie case by pro-

On remand, the Fifth Circuit vacated only the portion of its prior opinion that dealt specifically with the promotion claims of the named plaintiff. The court of appeals reinstated all other aspects of its opinion, including that which affirmed the district court's certification of a class to include job applicants. Cert. Pet. 1a-4a.

SUMMARY OF ARGUMENT

The issue before this Court is whether a plaintiff employee who alleged discrimination under Title VII with respect to job promotion was properly certifiable as a representative of a class of alleged discriminatees with respect to job hiring. The Fifth Circuit approved such certification primarily because the plaintiff employee alleged discrimination on the same basis (*i.e.*, national origin) in both instances, and alleged so-called "across-the-board" discrimination by the employer.

The court of appeals' ruling in this regard is incorrect, and should be reversed. Its approach to Rule 23 certification places virtually no limits on the scope of over-broad class allegations and plainly permits a named plaintiff to represent a class with which he has divergent and even antagonistic interests. Accordingly, it impermissibly dispenses with specific certification requirements under Rule 23 of the Federal Rules of Civil Procedure, which require typicality in, and adequacy of representation. Furthermore, the court of appeals' application of a so-called "across-the-board" approach to Title VII class actions substantially dilutes Title VII's distinction between individual and class suits by automatically attributing the characteristics of the latter to those of the former, and thus undercuts Title VII's procedural framework for individual complaints.

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ducing *some* evidence that the employer's action was based upon a non-discriminatory reason. The petition now before this Court does not concern the *Burdine* issue. Cert. Pet. 6-7.

Rule 23 requires a named class plaintiff to demonstrate that he is a member of the specific class of discriminatees he purports to represent and to show that he is an adequate representative of the class. Fed. R. Civ. P. 23(a)(3) and (4). Accordingly, the named class plaintiff must "possess the same interest and suffer the same injury" as class members. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974). This Court has reiterated these requirements specifically in the context of a private Title VII suit. *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

That a plaintiff alleging discrimination on the job does not possess the same interest and suffer the same injury as plaintiffs alleging discrimination in hiring is plain from the views expressed by this Court in previous cases. In *Rodriguez*, this Court concluded that job transfer-based claimants who could not establish their own claims could not mount a class action concerning discrimination in initial job assignments. *Id.* at 403. Similarly, promotion-based claimants who seek to represent unsuccessful job applicants are "not members of the class of discriminatees they purport to represent." *Id. See, e.g., Scott v. University of Delaware*, 601 F.2d 76, 87 (3d Cir. 1979), *cert. denied*, 444 U.S. 931 (1979); *Hill v. Western Electric Co.*, 596 F.2d 99, 101-02 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); *Golden v. Firefighters Association Local 55*, 633 F.2d 817, 826 (9th Cir. 1980).

Inherent in this Court's approach in *Rodriguez* is the principle that genuine class action suits, including those under Title VII, require representatives whose *interests* (and not only background) are similar. Rather than accept broad allegations, as the Fifth Circuit permitted in this case, class certification should be permitted only when the representative shows he has been subject to the same pattern or practices as his purported class. In *General Telephone Company of the Northwest, Inc. v.*

EEOC, 446 U.S. 318 (1980), which held that the EEOC is not required to conform to the class action requirements of Rule 23, this Court observed with respect to private suits under Title VII:

> "In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. *Under Rule 23, the same plaintiff could not represent these classes.*" *Id.* at 331. (Emphasis added.)

As indicated in this Court's language in *General Telephone v. EEOC*, the reasons for applying the strict certification requirements of Rule 23 in private, Title VII litigation, are in large part attributable to the fact that employees and job applicants often are in competition with one another and may seek relief inconsistent or antithetical to each other's interests. This is true even though both happen to share the same or similar racial or ethnic background. Furthermore, overbroad class certifications that allow the litigation of Title VII charges unsupported by factual allegations not only make such class actions unmanageable, but deprive defendants of sufficient notice of the exact employment practices that are being challenged. Such a lack of notice is particularly egregious in Title VII cases, for the statute anticipates opportunities for conciliation prior to litigation. If defendants are not adequately apprised of the nature of plaintiffs' claims, they are hampered in their efforts to exercise their conciliation rights.

Accordingly, in order to avoid the inevitable unfairness and confusion resulting from a representative from one employment category representing the interests of those in another category, this Court should expressly disallow the so-called "across-the-board" approach to Title VII class actions and reverse that part of the judgment below relating to the proper scope of the class.

ARGUMENT

A Named Plaintiff Who Alleges Job Promotion Discrimination Under Title VII Is Not a Proper Representative Under Rule 23 of the Federal Rules of Civil Procedure To Litigate Class Claims On Behalf of Unsuccessful Job Applicants

A. *An Alleged Promotion Discriminatee Is Neither A Typical Nor An Adequate Representative of Alleged Hiring Discriminatees for Purposes of Class Certification Under Rule 23*

Rule 23 of the Federal Rules of Civil Procedure permits the consolidation of a large number of individual claims in a single lawsuit *only* if a named class plaintiff establishes certain specified prerequisites. Those prerequisites, which are designed in part to protect the interests of defendants and absent class members, include a demonstration that the plaintiff is a member of the class he seeks to represent, that his claim is typical of the class, and that he adequately represents the class.[5] The

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[5] Rule 23(a) provides that a party may sue as a class representative if it is a member of the class and if:

> "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

That a plaintiff must be a member of the class which he seeks to represent is also an element of Constitutional standing under Article III. See *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Proper class representation also is important with respect to the res judicata impact of class action litigation. See *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 256 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975):

> "Adequacy of representation of the class is a mandatory requirement for the maintenance of a class action under Rule

burden is upon the plaintiff to show that he has satisfied these requirements. See *Patterson v. General Motors Corp.*, 631 F.2d 476 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1988 (1981).

In this case, the named plaintiff's individual claim essentially is limited to the Company's refusal to grant a specific promotion. He alleged no injury suffered in initial hiring. The plaintiff nevertheless sought, and was granted certification by the trial court, to represent a class of unsuccessful job applicants. The Fifth Circuit approved the class certification primarily on the grounds that the plaintiff and the purported class shared a common national origin, a broadly-phrased class undifferentiated by any definition of the *practice* alleged to be illegal.[6] EEAC submits that this determination is plainly contrary to the views expressed previously by this Court.

23(a). If the representation proves inadequate, members of the class would not be bound," *citing Hansberry v. Lee*, 311 U.S. 32, 44-46 (1940).

[6] At one point in its opinion, the Fifth Circuit sought to establish that the plaintiff had showed more than an alliance based simply on the same type of discriminatory claim. Disclaiming the notion that this similarity alone would be sufficient to meet the requirements of Rule 23 (Cert. Pet. 14a n.9), the court cited its previous decision in *Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300, 1304 (5th Cir. 1980), to note that the plaintiff also "showed a similarity of interests based on job location, job function and other considerations." Cert. Pet. 13a. The court of appeals' citation is particularly ironic, in that *Crawford* cited for support the Fourth Circuit's opinion in *Hill v. Western Electric Co.*, 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979), which rejected the very approach to Title VII class certification taken here by the Fifth Circuit as antithetical to *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977). In any event, and as we demonstrate below, the interests of promotees and job applicants are so substantially dissimilar in most cases that the existence of other shared interests does not affect the typicality and commonality requirements of Rule 23.

The conditions under which a Title VII plaintiff could maintain a class action in circumstances similar to this case were closely examined in *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977). In that case, individual plaintiffs alleged that the defendant company discriminated by refusing to approve their applications for transfer to "road" jobs. This Court addressed the question whether under Rule 23 of the Federal Rules of Civil Procedure, such plaintiffs could also mount a class action on behalf of those alleging discrimination in initial job assignments. Declaring that "careful attention to the requirements of Fed. Rule Civ. Proc. 23" in private Title VII litigation is "indispensable," *id.* at 405, this Court answered the question in the negative. It found specifically that the plaintiffs "were not members of the class of discriminatees they purported to represent." *Id.* at 403. Quoting from *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974), this Court reiterated, in the context of Title VII, that a class action may be maintained only by persons who "possess the same interest and suffer the same injury as the class members." 431 U.S. at 403. Since the plaintiffs in *Rodriguez* had suffered no discrimination in their hiring or initial assignment, they could not undertake a classwide attack on the hiring or initial assignment policies of the employer. *Id.* at 404.

Rodriguez pinpointed a crucial aspect of the typicality requirement under Rule 23 in the context of employment discrimination litigation: the claims of current employees are not typical of the claims of job applicants.[7]

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[7] Even before the Court's ruling in *Rodriguez*, federal courts outside the Fifth Circuit questioned, and refused to follow in instances similar to this case, an atypically broad approach to Rule 23 in Title VII class actions. For example, then-Chief Judge Timbers of the District of Connecticut questioned the soundness of the reasoning in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (1969), shortly after that Fifth Circuit ruling. Insisting that a class be limited to individuals raising the same claims as are

And, indeed, it was specifically on the basis of this Court's ruling and opinion in *Rodriguez* that the Fourth Circuit Court of Appeals ruled in a case similar to the one here at bar that plaintiffs complaining of racial discrimination allegedly suffered by them in assignments and promotions could not represent as class representatives persons denied employment on racial grounds. *Hill v. Western Elec. Co.*, 596 F.2d 99, 101 (4th Cir.), *cert. denied*, 44 U.S. 929 (1979).

The Fourth Circuit has since reaffirmed this application of *Rodriguez* in several other cases. In *Abron v. Black & Decker (U.S.), Inc.*, 26 FEP Cases 369 (4th Cir. 1981), for example, the court of appeals ruled that the district court had erred in certifying a class under the facts of that case. It stated:

> "The class primarily certified by the district court embraced discriminatees in hiring, and the affirmative action ordered by the district court in its order was basically directed at hiring practices. The plaintiff, however, suffered no injury as a result of any such practices. By her testimony she applied for work and was promptly hired. She lacked any standing to

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stated by the representative plaintiff, the court quoted from *Burney v. North American Rockwell Corp.*, 302 F. Supp. 86, 90 (C.D. Cal. 1969), which ruled that a plaintiff alleging a discriminatory discharge cannot fairly and adequately represent the interests of those individuals charging discrimination in job assignments, overtime or vacations, even though all purported plaintiffs were of the same affected class. *Hyatt v. United Aircraft Corp., Sikorsky Aircraft Div.*, 50 F.R.D. 242, 245-46 (D. Conn. 1970). *See also Williams v. Wallace Silversmiths, Inc.*, 75 F.R.D. 633, 635 (D. Conn. 1976), *appeal dismissed*, 566 F.2d 364 (2d Cir. 1977) ("[t]he interests that plaintiffs [all of whose claims relate to their conditions of employment] assert they have in insuring a nondiscriminatory hiring policy—eradicating the badge of slavery that results from racist employment practices, ending their own isolation at the company, and eliminating the defendant's reputation as a discriminatory employer—are too general in nature to make them adequate representatives of a class of persons with whom they have no category in common").

represent a class of persons who had been denied employment, whether affirmatively or by reason of a failure to recruit. . . . Never having been discriminated against in hiring, or recruitment, or promotion, or inclusion in the apprenticeship, or transfers (except for the unique one she asserted), there was no basis for a class certification in the case." *Id.* at 374.

The Fourth Circuit addressed the issue of proper Title VII class certification again in *Brown v. Eckerd Drugs, Inc.*, 27 FEP Cases 137 (4th Cir. 1981), *petition for rehearing denied.* In that case, the court of appeals affirmed the trial court's certification of two discharged black employees as proper representatives for challenging the employer's promotion system. The appeals court noted that if successful on their individual claims and reinstated, each named plaintiff, at the time of certification, could anticipate that she would once again be subjected to the employer's discriminatory promotion practices. *Id.* at 145. Citing *Rodriguez*, the Fourth Circuit approved the certification because the named plaintiffs could show that "in addition to their particularized claims of discriminatory dismissal, each was injured by discriminatory promotion practices." *Id. Cf. Chisholm v. United States Postal Service*, 27 FEP Cases 425, 434-35 (4th Cir. 1981) (plaintiff-employee was an appropriate representative in Title VII class action because he "personally experienced most of the discriminatory practices and patterns complained of by the members of the class").

Other circuits, with the notable exception of the Fifth Circuit, (see note 11, *infra*), have similarly followed suit. See *DeGrace v. Rumsfeld*, 614 F.2d 796, 80-10 (1st Cir. 1980) (absence of a "community of interest" between the two employment categories); *cf. Scott v. University of Delaware*, 601 F.2d 76, 87 (3d Cir.), *cert denied*, 444 U.S. 931 (1979) (a sole named representative who attains employee status cannot be injured by any alleged discriminatory hiring practice; hence, he cannot lead a class challenging the employer's hiring practices); *Golden v.*

Firefighters Ass'n Local 55, 633 F.2d 817 (9th Cir. 1980), and *Chavez v. Tempe Union High School Dist. No. 213*, 565 F.2d 1087 (9th Cir. 1977); *Walker v. World Tire Corp.*, 563 F.2d 918 (8th Cir. 1977).[8]

The reason for maintaining a dichotomy between applicants and employees for purposes of Title VII class actions is grounded upon sound practical considerations that have profound legal consequences. These considerations were explicitly noted by this Court in *General Telephone Company of the Northwest v. EEOC*, 446 U.S. 318 (1980). In that case, the Court held that the EEOC is not required to conform to the class action requirements of Rule 23. After observing that the typicality requirement of Rule 23(a) "is said to limit the class claims to those fairly encompassed by the named plaintiff's claims," this Court observed, 446 U.S. at 321, that with respect to private suits:

> "In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. *Under Rule 23, the same plaintiff could not represent these classes.*" (Emphasis added.)

This Court thus recognized that because a promotion-based claim often anticipates relief inconsistent with, if not antagonistic to, relief based upon hiring claims, a named plaintiff seeking promotion is an inadequate representative of applicants seeking initial hire. The circuit

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[8] Since *Rodriguez*, numerous district courts also have ruled that plaintiff-employees are improper representatives of unsuccessful applicants. *See, e.g., Fields v. Village of Skokie*, 502 F. Supp. 456, 461 (N.D. Ill. 1980); *Talley v. Hoechst Fibers Industries*, 24 FEP Cases 580, 586 (D. S.C. 1979); *Brown v. J.P. Allen Co.*, 24 FEP Cases 578, 579 (N.D. Ga. 1978); *Helbling v. Unclaimed Salvage & Freight Co*, 22 FEP Cases 560, 561 (E.D. Pa. 1979); *Abercrombie v. Bi-Lo, Inc.*, 21 FEP Cases 1252, 1261 (D. S.C. 1979); *Queen v. Dresser Industries*, 21 FEP Cases 757, 761 (D. Md. 1977).

courts have made similar observations concerning the likelihood of conflict between an incumbent employee and those not yet employed, *Scott*, 601 F.2d at 86, and the potential extinction of valid claims caused by a framing of overbroad classes, *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring).[9]

Implicit in the Fifth Circuit's departure from this well-established precedent is the notion that Rule 23 class actions under Title VII should be approached in a more "flexible" manner than class actions in other contexts. "While similarities of sex, race or national origin claims are not dispositive in favor of finding that the prerequisites of Rule 23 have been met," the court of appeals opined, "they are an extremely important factor in the determination, that can *outweigh* the fact that the members of the plaintiff class may be complaining about somewhat different specific discriminatory practices." Cert. Pet. 13a (emphasis added). This Court, however, has cautioned against overly broad class certification. *Mathews v. Diaz*, 426 U.S. 67, 71 n.3 (1976). Moreover, *Rodriguez* establishes that specific discriminatory practices help *define* typicality and commonality under Rule

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[9] As Judge Godbold noted, the presumption that broad class treatment is appropriate may even be contrary to the interest of the class:

> "And, what may be most significant, an overbroad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process. . . . One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?"

23. What *Rodriguez* spelled out as a mandatory analytical framework for Rule 23 class certification issues under Title VII the Fifth Circuit has improperly construed as merely a subsidiary (and discretionary) element.

In sum, the certification requirements of subdivision (a) of Rule 23 state the prerequisites for maintaining *"any"* class action. Fed. R. Civ. P., Advisory Committee Notes, 39 F.R.D. 100 (1966) (emphasis added).[10] And, as the Fourth Circuit has recognized, Title VII class actions are subject to "the same kind and degree of practical and conceptual analysis looking to class action allowance" that Rule 23 prescribes "without differentiating by subject matter—for class actions in general." *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 273 (4th Cir. 1980). A named plaintiff must be a member of the class it "seeks to represent at the time the class action is certified," *Sosna v. Iowa*, 419 U.S. 393, 403 (1975), by having a "personal stake in the outcome," *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980), demonstrated by "possess[ing] the same interest and suffer[ing] the same injury" as class members, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974). Where, as in this case, a named plaintiff alleging discrimination in promotions seeks to represent a class of plaintiffs constituting unsuccessful job applicants, the certification standards of Rule 23 plainly are not satisfied. *Rodriguez, supra. Cf. General Telephone Company of the Northwest v. EEOC, supra.*

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[10] Congress, of course, can modify the effect of Rule 23, and it in fact has done so in several statutes. A representative list of such statutes is reproduced in Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688, 703 n.87 (1980). *Cf. General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980) (EEOC not required to conform to the class action requirements of Rule 23). This case involves no such modification.

B. *Because the So-Called "Across-The-Board" Approach To Class Actions Substantially Dilutes Title VII's Distinction Between Individual and Class Suits, This Court Should Expressly Disallow Its Use*

The Fifth Circuit has long applied a so-called "across-the-board" approach to Title VII class actions to enable a class action plaintiff to allege charges of employment discrimination in a variety of employment categories, although the named plaintiff has been injured at most by only one particular practice.[11] The court expressly did so in this case by agreeing with the plaintiff representative that "this Court still permits 'across the board' attacks on discrimination." Cert. Pet. 12a. As demonstrated below, this approach too readily turns every individual suit into a convertible class action, and thus cannot be squared with Rule 23. Moreover, any notion that Title VII cases do not require the same inquiry with reference to compliance with Rule 23 as other types of cases "was authoritatively dispelled by the decision in *East Texas Motor Freight Systems, Inc. v. Rodriguez, supra* . . . ." *Shelton v. Pargo*, 582 F.2d 1298, 1312 (4th Cir. 1978).

Proponents of the "across-the-board" approach have relied on general philosophical arguments with respect to Title VII's meaning and purpose. It has been said by some courts that "[r]acial discrimination is by definition a class discrimination. If it exists, it applies throughout

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[11] For other applications of the "across-the-board" approach by the Fifth Circuit, *see Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978); *Satterwhite v. City of Greenville*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vac. and remanded*, 445 U.S. 940 (1980); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). *But cf. Johnson v. American Credit Co.*, 581 F.2d 526, 532-33 (5th Cir. 1978) (Wisdom, J.) ("A fundamental requirement [under Rule 23] is that the representative plaintiff must be a member of the class she wishes to represent [citing *Rodriguez*]").

the class." [12] Whatever the philosophical merits of such an assertion, however, it has no basis in Title VII, which *requires* that a plaintiff have an *individual* complaint and assert an individual grievance. Title VII, § 706. Further, the defendant must receive notice of the grievance and an opportunity to conciliate. Contrary to this requirement, however, "across the-board" discrimination complaints effectively permit any employee, even though he has no individual grievance, to maintain a class action, in violation of the entire structure of Title VII. *Brown v. Eckerd Drugs, Inc.*, 27 FEP Cases 137, 163 (4th Cir. 1981) (Russell, J., dissenting), *pet. for rehearing denied*, —— FEP Cases ——.[13]

Even before *Rodriguez*, some courts outside the Fifth Circuit rejected the "across-the-board" approach as irreconcilable with the requirements of Rule 23.[14] "[T]his

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[12] *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966). According to one commentator, *Hall* was the first reported Title VII class action, and "influenced the seminal line of early Fifth Circuit decisions." *Rutherglen, supra* note 10, at 706-10.

[13] In any event, the distinction in the Act between individual and "pattern or practice" actions show that Congress did not view all Title VII suits inherently as class actions. *Cf.* Rutherglen, *supra* note 10, at 708.

[14] The Fifth Circuit itself has cautioned that "[c]ounsel for the class have the primary responsibility for pressing a class action claim. They do not satisfy their responsibilities by simply affixing the class action label to a suit and depositing it with the clerk." *Satterwhite v. City of Greenville, supra*, 578 F.2d at 999. In order to be an adequate representative under 23(a)(4), of course, it must appear that the representative will *vigorously* prosecute the interests of the class through qualified counsel. *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973). A plaintiff who has not completely advanced the issue of class certification does not meet this standard. The ability to adequately and fairly represent asserted class members is rightfully determined from the plaintiff's per-

[across-the-board] approach," Chief Judge Arraj of the District of Colorado opined, "seems to be overbroad, because it substitutes a conclusory accusation for the actual similarity of grievances which the rule [23] would seem to require." *White v. Gates Rubber Company*, 53 F.R.D. 412, 413 (D. Colo. 1971).

Similarly, in *Kinsey v. Legg, Mason & Company, Inc.*, 60 F.R.D. 91 (D. D.C. 1973), Judge Gasch cautioned that "not every civil action brought pursuant to Title VII automatically qualifies as a proper class action under the stringent requirements of Rule 23(a)." *Id.* at 98. Citing *Gresham v. Ford Motor Co.*, 53 F.R.D. 105, 106-07 (N.D. Ga. 1970), the court declared as unacceptable, on both a legal and equitable level, the premise that every civil action for racial discrimination in employment states a case for treatment as a class action. *See also Mason v. Calgon Corp.*, 63 F.R.D. 98 (W.D. Pa. 1974); *Blankenship v. Wometco Blue Circle, Inc.*, 59 F.R.D. 308, 309 (E.D. Tenn. 1972) (plaintiff only affected in terms of promotional opportunities cannot represent class claims relating to discrimination in hiring and recruitment).

Since *Rodriguez*, courts have overwhelmingly rejected the "across-the-board" approach, noting that "class certification in discrimination cases are not to be made automatically as a mere matter of course on the basis of the allegations in the complaint, nor is the mere invocation of Rule 23's language any "mystical legal talisman guaranteeing class treatment." *Talley v. Hoechst Fiber Industries*, 24 FEP Cases 580, 583 (D. S.C. 1979), *citing*

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formance in seeking class certification. A so-called "liberal" certification procedure would serve only to disguise the plaintiff's inability to fairly protect the interests of asserted class members and would further undercut the statute's requirements for pre-suit conciliation efforts.

Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304 (9th Cir. 1977). *See also Shelton v. Pargo, supra; Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904 (4th Cir. 1978); *Forrester, et al. v. Vermilye, et al.*, 78 F.R.D. 68, 69 (E.D. Tenn. 1978). As another court has noted:

> "Courts have on occasion suggested that the mere assertion of an individual claim together with omnibus allegations of discrimination are sufficient to satisfy the requirements of Rule 23(a)(2) and (b)(2). [Citations omitted.] The dangers of such an approach are readily apparent. If the mere allegation of pervasive discrimination were sufficient to satisfy the common question requirement in this type of case, courts would transform every individual grievance into a potential class action. Because of the enormous increase in back pay exposure as well as the expense of class-based discovery, this would vastly increase the bargaining power of disgruntled minority and female employees in the course of settlement negotiations. See *Arey v. Providence Hospital*, 55 F.R.D. 62, 68, (D. D.C. 1971)."

Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 479 (N.D. Calif. 1978).

In sum, a "class certified can embrace a group no larger than those affected by the same injury claimed by plaintiff and this rule has now been made final by *Rodriguez.*" *Talley v. Hoechst Fibers Industries, supra*, 24 FEP Cases at 585. Consistent with this principle, an employee may not represent rejected applicants, because the injuries are different and "the presence of applicants and employees in the same class represented by the same plaintiff may generate conflicts." *Moore v. National Ass'n of Securities Dealers*, 27 EPD ¶ 32,238 at 22,710 (D. D.C. 1981), *citing GTC v. EEOC, supra.*

CONCLUSION

For the reasons stated above, the ruling of the Court of Appeals that a current employee may represent unsuccessful applicants should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO FALCON.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICI CURIAE*

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IN THE

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---

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICI CURIAE*

INTEREST OF AMICI *

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation whose principal purpose is to secure the civil and constitutional rights of black persons through litigation and education. For more than forty years, its attorneys have represented parties in thousands of civil rights cases, including many significant employment discrimination cases before this Court and the lower courts. See, e.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

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* The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

The Mexican American Legal Defense and Educational Fund, Inc., is a nonprofit corporation whose principal purpose is to secure the civil and constitutional rights of persons of Mexican descent through litigation and education. Since its founding in 1968, its attorneys have participated in many lawsuits involving employment discrimination in this Court and the lower courts. See, e.g., *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977); *White* v. *Dallas Independent School District*, 581 F.2d 556 (5th Cir. 1978) (en banc).

Amici believe that the Court's decision in the case at bar may affect their representation of minorities in future cases. Amici further believe that their experience in employment litigation will assist the Court in this case.

SUMMARY OF ARGUMENT

Petitioner raises far-ranging issues of law and policy under Title VII and Rule 23. Seeking broad and severely restrictive pronouncements on these issues, Petitioner invents a straw man—the totally unsubstantiated "across-the-board" class action—and urges the Court to tear it apart with artificial and inflexible rules that would severely undermine the ability of lower courts to exercise discretion in the application of Rule 23 to class action determinations and in the use of case management devices in Title VII actions.

1. This is not an appropriate case in which to make such far-reaching decisions. The central issue of whether a class action is proper in this case may be reconsidered by the district court on remand from the Fifth Circuit. There is a substantial question as to satisfaction of the numerosity requirement of Rule 23(a)(1), which was not addressed by the Fifth Circuit or raised by Petitioner here, since it now appears that there are at most 13 class members. The district court might well choose to entertain the claims of those 13 individuals by joining them under Rule 23(d)(2) or Rule 21. In any event, this case is a poor vehicle for this Court to use in prescribing gen-

eral standards for the hundreds of Title VII class actions brought each year in the lower courts. The writ should therefore be dismissed as improvidently granted.

2. Broad class actions are not only permissible in employment discrimination actions where the requirements of Rule 23 are met, but are favored as a matter of national policy and congressional intent. Congress has recognized that discrimination, where it exists, is inherently based on class-wide characteristics, and has approved the use of class actions to extirpate such discrimination. Broad civil rights actions are also fully consistent with the purpose of Rule 23.

3. The Fifth Circuit has conscientiously and carefully applied Rule 23 in determining whether broad class treatment is proper for particular employment discrimination cases. It has never dispensed with the requirement that the criteria of Rule 23(a) be met as a prerequisite to the maintenance of Title VII class actions, nor would proponents of Title VII enforcement suggest such a course. But equally important, the specific requirements of Rule 23(a) must not be construed so rigidly or narrowly that class actions are eliminated or that district courts lose the discretion to apply Rule 23(a) properly to the facts of each case. The rules proposed by Petitioner—such as the artificial axioms that an employee can never properly represent a job applicant, or that a plaintiff whose case is decided under disparate-treatment theory can never represent a class whose claims are based on disparate-impact analysis—would flatly prohibit many types of Title VII class actions that are often found proper by the lower courts.

4. The Fifth Circuit properly applied Rule 23 in this case. Its affirmance of the district court's class determination, subject to reconsideration, was based on evidence meeting the requirements of Rule 23. Petitioner's attack on the ruling below as based only on a presumption in favor of across the board class actions is misdirected.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

The questions presented and the arguments made by General Telephone and the Department of Justice raise critical issues concerning the application of the class action procedure of Rule 23, Fed. R. Civ. P., to actions brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and other civil rights laws. Amici submit that this case does not provide an appropriate basis for resolving these critical issues. We therefore urge the Court to dismiss the writ of certiorari as improvidently granted.

First, the merits of the class case were remanded to the district court for a reconsideration of the plaintiffs' and defendants' statistics and the sufficiency of the evidence to support a finding of hiring discrimination. That reconsideration may well result in narrowing the class held to have been affected by discriminatory hiring practices.[1] Therefore, the original class determination may be subject to reconsideration. The current class certification order is subject to revision both under the provisions of Rule 23(c)(1) and by the language of the order itself which stated, ". . . Defendant may at any time raise the issue of this provisionally-certified class during or after the presentation of the class claims and evidence at trial." App. 51a. The issues in this case are not ripe for this Court's review until there has been a final judgment on the merits.[2]

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[1] The court of appeals suggested that the period in which hiring discrimination occurred may have ended earlier than originally found by the district court. The case was remanded for a determination of the extent of that period. Appendix to the Petition for a Writ of Certiorari, pp. 27a-28a. ("App."). Class membership will be affected by that determination.

[2] See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). It is particularly inappropriate for the Court to exercise its discretion to review this interlocutory order since there are few universally

Second, in the present case the issue of whether the case is properly a class action may well be moot. At the time the class was provisionally certified prior to the Phase I liability determination, the numerosity requirement of Rule 23(a)(1) was apparently met. However, after a finding of liability for hiring discrimination at Phase I of the trial, only 13 individuals filed proof-of-claim forms to receive back pay and job security awards. Only those individuals were considered members of the class seeking relief at the Phase II trial. The existence of a class too numerous for individual joinder to be practicable has been considered perhaps the most fundamental requirement of Rule 23. *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1454 (1976). Here it is obvious that joinder is practicable since all the individuals who comprise the class are in effect joined. This Court's review is unnecessary to disposition of the class members' claims because the merits of the class hiring discrimination case were remanded to the trial court and the interests of the 13 persons before that court will not depend on whether there is a class action.[3] The issues presented and arguments made by General Telephone seek, in effect, an advisory opinion in favor of other employers, limiting other plaintiffs' ability to maintain broad class actions.[4]

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applicable answers to the difficult and fact-sensitive problems faced by the district courts in applying Rule 23. Each party seeking to obtain certification of a broad class action is required to satisfy the criteria of Rule 23 based on the facts of that party's case. Whether an employee can represent applicants in an employment discrimination action should therefore be determined on a case by case basis, not according to any inflexible rule. In this case the district court on remand may and indeed should reconsider whether Rule 23(a) is satisfied. While amici believe that the district court may properly hold that Falcon is a proper representative of the class, see Section II,C, *infra*, that issue is not appropriate for determination on this record by this Court.

[3] If class certification were revoked, the 13 individuals would apparently remain in the case as intervenors. See text *infra*.

[4] The district court in the present case certified a class of Hispanic employees "who are employed and employees [sic] who have applied

The present case should be remanded to the trial court for a determination of whether the 13 individual claimants should be allowed to intervene in the action pursuant to Rule 23(d)(2) or should be joined as plaintiffs pursuant to Rule 21. Rule 23(d)(2) provides that the Court may order that notice be given to class members allowing them to intervene. Intervention in class actions is permitted by the Rule to strengthen the adequacy of representation of the class[5] and can be allowed even though the proposed intervenor is already an adequately represented class member.[6] In employment discrimination cases, intervention by an applicant in a class action brought by an incumbent employee is proper.[7] The intervenors are not required to exhaust administrative remedies if the plaintiff or one or more class members have done so.[8] On remand, the trial court may notify the 13 applicants of their right to intervene in this case to protect their interests and to strengthen the representation of the class. Such intervention may be allowed whether

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for employment in the Irving Division of the Defendant Company, and no other division." App. 48a. This case presents no issues concerning the application of Rule 23 to a class which includes future applicants and employees. The class certified here included only present and former applicants and employees, and aside from plaintiff Falcon, only 13 such persons were found to be entitled to any relief.

[5] *Sanders* v. *John Nuveen & Co., Inc.*, 463 F.2d 1075 (7th Cir.), *cert. denied*, 409 U.S. 1009 (1972).

[6] *Groves* v. *Insurance Co. of North America*, 433 F.Supp. 877 (E.D. Pa. 1977).

[7] *Muskelly* v. *Warner & Swasey Co.*, 653 F.2d 112 (4th Cir. 1981). Cf. *Goodman* v. *Schlesinger*, 584 F.2d 1325 (4th Cir. 1978); *Cox* v. *Babcock & Wilcox*, 471 F.2d 13 (4th Cir. 1972).

[8] *Wheeler* v. *American Home Products Corp.*, 582 F.2d 891, 897 (5th Cir. 1977); *Allen* v. *Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); see *Crawford* v. *United States Steel Corp.*, 660 F.2d 663, 665-666 (5th Cir. 1981); *Zipes* v. *Trans World Airlines, Inc.*, No. 78-1545, Slip Opinion, p. 7 (Feb. 24, 1982) (the "filing [of] a timely charge . . . with the EEOC is not a jurisdictional prerequisite").

or not the class representative continues to meet the requirements of Rule 23.

Joinder of the 13 individual applicants pursuant to Rule 21 would also be proper in this case.[9] Under this Rule, a party can be added *sua sponte* by the court for remedial purposes even after judgment.[10] Indeed, this Court has added parties under Rule 21 on appeal. *Mullaney* v. *Anderson*, 342 U.S. 415, 417 (1952). Since the original suit brought by Falcon in 1972 was timely commenced, joinder of the 13 individual applicants would relate back to the date of the original pleading and would not be barred by the statute of limitations.[11]

Considering the small number of individuals whose interests are presently before the Court and the practicability of joinder in this case, a remand to the district court for intervention or joinder of the parties would adequately protect their interests. In view of the Fifth Circuit's remand for reconsideration of the merits of the case, and in view of the district court's ability to reconsider the class ruling under its own order and Rule 23(c)(1), this case does not present an appropriate basis for determining the important class action issues raised by Petitioner. Since this Court's decision is unnecessary to the just disposition of the claims of members of the class whose existence is contested by Petitioner, amici submit that the writ of certiorari was improvidently granted and should be dismissed.

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[9] Rule 21 should be construed consistently with other rules which in substance provide for adding parties and bear a relation to changes in class actions under Rule 23. See *Harris* v. *Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir. 1964). The proper inquiry under Rule 21 is whether joinder will prejudice the nonmoving party and whether it will serve to avoid the multiplicity of suits. 3A *Moore's Federal Practice*, ¶ 21.04[1], p. 21-25.

[10] *Du Shane* v. *Conlisk*, 583 F.2d 965, 967 (7th Cir. 1978).

[11] Rules 15(C) and 17(a), Fed. R. Civ. P. See *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977).

II. A TITLE VII CLASS ACTION MAY PROPERLY BE MAINTAINED ON BEHALF OF A BROAD CLASS WHEN THE REQUIREMENTS OF RULE 23 ARE SATISFIED.

A. The Fifth Circuit's Standard Permitting Certification of Broad Classes in Employment Discrimination Actions Is Consistent with the Class-Based Nature of Discrimination, and it Effectuates the Purposes of both Title VII and Rule 23.

1. *Unlawful Discrimination Is Class-Based.*

Where an employer maintains a policy of discriminating against a racial or ethnic group, that policy affects all members of that group who either work for the employer or seek to work for the employer. As the Senate Committee on Labor and Public Welfare recognized in its report on the bill which became the Equal Employment Opportunity Act of 1972:

> The committee agrees with the courts that title VII actions are by their very nature class complain[t]s, and that any restriction on such actions would greatly undermine the effectiveness of title VII.

S. Rep. No. 92-415, 92d Cong., 1st Sess. 27 (1971) (footnote omitted). Just as this Court has held that black students may challenge discrimination in faculty employment to vindicate their interest in securing an educational environment free from all forms of racial discrimination, *Rogers* v. *Paul*, 382 U.S. 198, 200 (1965), so also may black and Hispanic workers challenge discrimination in all aspects of their work environment. See *Sosna v. Iowa*, 419 U.S. 393, 413 n.1 (1975) (White, J., dissenting); Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 Yale L.J. 868, 886 (1979).

In applying Title VII, the courts are necessarily confronted with the task of dealing with class discrimination. "[T]he evil sought to be ended is discrimination on the basis of a class characteristic . . . ." *Bowe* v. *Colgate-*

Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969). Of course, "[t]he fact that plaintiffs are members of the same race as the other employees and rejected job applicants . . . is not enough in itself to require a finding under Rule 23 that their representation was adequate or that their claims were typical of the class." *Crawford* v. *Western Electric Co.*, 614 F.2d 1300, 1304 (5th Cir. 1980). But ". . . suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present." *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. at 405. The class-based nature of discrimination should inform and guide a court's discretionary determination as to whether an action should proceed on a class basis.[12]

2. *Congress Expressly Approved the Use of Broad-Based Class Actions in Title VII Cases.*

The Civil Rights Act of 1964 was designed to eliminate pervasive racial and ethnic discrimination and the adverse social and economic consequences of that discrimination. *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 202 (1979). In enacting Title VII of that Act, Congress did not specifically address the use of class actions in enforcing the law against discrimination in employment.[13] However, Congress "considered the policy against

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[12] In its brief amicus curiae in the present case, the Justice Department fails to discuss both the class-based nature of employment discrimination and the relevant legislative history of Title VII. However, in a series of briefs to this Court over the course of the past decade, the Government has specifically emphasized these considerations in related class action contexts. See nn. 16, 22, 25, *infra*. We note that the Justice Department's concern with Rule 23 as a litigant in Title VII cases is solely as a defendant, see *General Telephone Co.* v. *EEOC*, 446 U.S. 318 (1980), and that the Equal Employment Opportunity Commission declined to sign the brief filed by the Justice Department in the present case.

[13] While some statutes have specific provisions governing class actions, see, e.g., the Fair Labor Standards Act, 29 U.S.C. § 216(b), and the revised Truth in Lending Act, 15 U.S.C. § 1640(a), generally Congress does not consider the place of class actions in the

discrimination to be of the 'highest priority'," *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), and "indicated [that] a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." *County of Washington* v. *Gunther*, 101 S. Ct. 2242, 2252 (1981), citing S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964). See *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). As this Court stated in *Griggs* v. *Duke Power Co.*, *supra*, "Congress provided in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act," *id.* at 425, and "[t]he objective of Congress in the enactment of Title VII . . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable *group* of white employees over other employees." *Id.* at 429-30 (emphasis added). See also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800-01 (1973).

Soon after the passage of the Civil Rights Act of 1964, the courts of appeals were called upon to determine the proper application of class action procedures to Title VII cases. As in other areas of racial discrimination law, the Fifth Circuit led the way.[14] In *Oatis* v. *Crown Zellerbach Corp.*, the first appellate application of Rule 23 to a Title VII case, the Fifth Circuit recognized that

> [r]acial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through

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statutory enforcement scheme. *Developments in the Law—Class Actions*, 89 Harv. L. Rev. at 1359. Therefore, in applying the class action device to a particular statutory scheme, the courts ordinarily must look to the policy underlying the statute. See generally Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L. J. 718 (1975).

[14] See F.T. Read and L.S. McGough, *Let Them Be Judged* (Metuchen, N.J.: Scarecrow Press, 1978); J. Bass, *Unlikely Heroes* (New York: Simon and Schuster, 1981).

> resort to the court would tend to frustrate our system of justice and order.

398 F.2d 496, 499 (5th Cir. 1968); see also *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). In 1969, the Fifth Circuit applied the rationale of *Oatis* and *Jenkins* in concluding that in appropriate circumstances Rule 23 would permit "an 'across the board' attack on unequal employment practices alleged to have been committed by the appellee pursuant to its policy of racial discrimination." *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969). The Court determined that Title VII and Rule 23 would be best served by a broad approach to the use of class actions in fair employment cases. *Id.* Three years later, Congress indicated its approval of the Fifth Circuit's approach. In 1972, Congress amended Title VII by enacting the Equal Employment Opportunity Act of 1972. The bill which originally passed the House precluded class actions by providing that

> [n]o order of the court shall require the admission or reinstatement of an individual . . . or the payment to him of any back pay, if such individual . . . neither filed a charge nor was named in a charge or amendment thereto. . . .[15]

The Senate Committee on Labor and Public Welfare specifically reviewed and rejected the restrictions on class actions proposed by the House bill. That committee reported out a bill known as the "William bill," S. 2515, which did not place any restriction on class actions. 117 Cong. Rec. 38030 (1971). The committee's report stated that the bill

> is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that title VII actions are by their very nature class complain[t]s,[16] and that any restriction on such

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[15] Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972* at 332 (GPO: 1972).

> actions would greatly undermine the effectiveness of title VII.

S. Rep. No. 92-415, 92d Cong., 1st Sess. 27 (1971). In footnote 16, the Committee cited with approval the Fifth Circuit's decisions in *Oatis* and *Jenkins*. After agreeing to a compromise substitute bill, 118 Cong. Rec. 3808 (1972), Senator Williams placed in the record a section-by-section analysis explaining his bill as amended. This analysis demonstrates that the Senate committee's original position favoring class actions was preserved:

> it is not intended that any of the provisions contained [in § 706] are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints. . . .

118 Cong. Rec. 4942 (1972). See 118 Cong. Rec. 7166, 7564. The Williams bill then passed the Senate. 118 Cong. Rec. 4944 (1972).

In reconciling S. 2515 with H.R. 1746, the conference committee adopted the Senate position on class actions. The section-by-section analysis of that committee's agreement recites the language quoted just above in its entirety and adds: "A provision limiting class actions was contained in the House Bill and specifically rejected by the conference committee." 118 Cong. Rec. 7168, 7565 (1972).

The congressional policy underlying the enactment of Title VII in 1964 and the express legislative history of the 1972 amendments demonstrate Congress' intention that the class action device be fully used in Title VII actions. *Vuyanich* v. *Republic National Bank*, 82 F.R.D. 420, 429-30 (N.D. Tex. 1979). The broad approach to Title VII

class actions adopted by the Fifth Circuit, followed by other courts, and approved by Congress "goes a long way toward effectuating the public interest." *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1220 (1971).[16]

General Telephone disputes the relevance of the 1972 legislative history. Brief, p. 43 n.97. It is true that, in interpreting § 703(h) of Title VII, this Court has relied upon the legislative history of the 1964 Act and not the 1972 Act. *County of Washington* v. *Gunther*, 101 S. Ct. at 2251 n.16; *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977). However, the legislative history of the 1972 Act was deemed of little relevance in those cases because Congress did not amend or reenact § 703(h) in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. However, the provisions authorizing Title VII actions by private litigants are contained in § 706, which was amended and reenacted in 1972. Accordingly, the Court should look to the legislative history of the 1972 Act in construing § 706 in the present case, as it has looked to the legislative history of the 1972 Act in construing § 706 in other cases. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. at 763-64; *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 414 (maintainability of class actions under

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[16] In previous cases the Solicitor General has relied on the legislative history of the 1972 amendments—stating, for example, that "any restriction on [class] actions would greatly undermine the effectiveness of Title VII"—as indicating the broad approach to class actions mandated by Congress. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, *Albemarle Paper Co.* v. *Moody*, Nos. 74-389 and 74-428, p. 33, quoting S. Rep. No. 92-415, 92d Cong. 1st Sess. 27 (1972); Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, *Franks* v. *Bowman Transportation Co.*, No. 74-728, p. 22. In stating the views of the Justice Department in this case, the Solicitor General did not refer to any of the legislative history on which his predecessors relied in determining the appropriate application of the class action procedure to Title VII cases.

Title VII); *Zipes* v. *Trans World Airlines*, No. 78-1545, Slip Opinion at 8.

Finally, General Telephone argues that allowing "private attorneys general" to bring broad-based class actions undermines the purposes of Title VII. Brief, pp. 30-40. First, as the prior discussion indicates, Congress has determined otherwise, and the Court should decline the company's invitation to second-guess Congress. Second, General Telephone is wrong. Private enforcement actions, and especially private class actions, have been the primary mechanism for developing and enforcing Title VII law. Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 St. L. L.J. 225 (1976). In fact, with the single exception of *Teamsters* v. *United States*, all of the landmark Title VII decisions of this Court announcing the standards for proving and remedying systemic discrimination have been made in cases brought by private plaintiffs.[17]

3. *The Fifth Circuit's Broad, Policy-Based Standard Is Consistent with Rule 23.*

The Fifth Circuit's broad approach to Title VII class actions is based on its recognition that most actions attacking "unequal employment practices alleged to have been committed . . . pursuant to [a] policy of racial discrimination" raise common questions of fact and law and present claims which may be addressed in a class action,

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[17] See, e.g., *Griggs* v. *Duke Power Co.*; *Albemarle Paper Co.* v. *Moody*; *Franks* v. *Bowman Transportation Co.*; *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *County of Washington* v. *Gunther*. Moreover, the Court has granted certiorari in five currently pending cases involving issues of systemic discrimination. Every one of those cases was initially brought by private plaintiffs. *State of Connecticut* v. *Teal*, No. 80-2147, 50 U.S.L.W. 3244 (Oct. 5, 1981); *Pullman-Standard* v. *Swint*, No. 80-1190, 49 U.S.L.W. 3788 (April 20, 1981); *American Tobacco Co* v. *Patterson*, No. 80-1199, 49 U.S.L.W. 3931 (June 15, 1981); *General Building Contractors* v. *Pennsylvania*, No. 81-280, 50 U.S.L.W. 3300 (Oct. 19, 1981); *Guardians Association* v. *Civil Service Commission of the City of New York*, No. 81-431, 50 U.S.L.W. 3547 (Jan. 11, 1982).

even where the specific discriminatory practices which flow from that policy may affect class members in different ways. This standard is aptly characterized as policy-based: the scope of the class may be defined by the reach of the effects of the employer's policy of employment discrimination. *Johnson* v. *Georgia Highway Express*, 417 F.2d at 1124; see also App. 12a, quoting *Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895, 900 (5th Cir. 1978).

The Fifth Circuit's application of Rule 23 in *Johnson* and subsequent cases is consistent with the basic policies which guided the revision of Rule 23 in 1966. As the Advisory Committee on the Federal Rules stated in its Note concerning amended Rule 23(b)(2):

> Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

39 F.R.D. 69, 102 (1966).

Rule 23 is not intended to restrict a class action only to those individuals who each suffer the effects of a policy of racial discrimination in precisely the same way. An action meets the requirements of Rule 23(b)(2) and the requirements of Rule 23(a)[18] "even if [the challenged policy] has taken effect or is threatened only as to one or a few members of the class. . . ." Moreover, the Rule "is intended to function as an effective vehicle for the bringing of suits alleging racial discrimination." Wright and Miller, 7 *Federal Practice and Procedure* § 1771, p. 662 (1972). See Kaplan, *Continuing Work of the Civil*

[18] An action described in the Advisory Committee's Notes as meeting the requirements of Rule 23(b) would also meet the requirements of Rule 23(a). Rule 23(b) only becomes relevant if the requirements of Rule 23(a) have been satisfied.

Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 389 (1967).[19]

In reaching its decision on the permissible scope of Title VII class actions in *Johnson* v. *Georgia Highway Express*, the Fifth Circuit relied upon *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963), and *Hall* v. *Werthan Bag Corp.*, 251 F.Supp. 184 (M.D. Tenn. 1966). A broad class action was permitted in *Potts* v. *Flax* because "[i]t sought obliteration of the policy of system wide racial discrimination," even though this required the issuance of "suitable declaratory orders and injunctions against *any* rule, regulation, custom or practice having any such consequence." 313 F.2d at 289 (emphasis added). In *Hall* v. *Werthan Bag Corp.*, the court held that a class could properly include both applicants and incumbent employees since both suffered from aspects of a discriminatory policy:

> Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. This does not mean, however, that the effects of the discrimination will always be felt equally by all the members of the racial class. For example, if an employer's racially discriminatory preferences are merely one of several factors which enter into employment decisions, the unlawful preferences may or may not be controlling in regard to the hiring or promotion of a particular member of the racial class. But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.

251 F.Supp. at 186.

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[19] Professor Kaplan stated that the "new subdivision (b)(2), [was built] on experience mainly, but not exclusively, in the civil rights field." Since Professor Kaplan was the reporter to the Advisory Committee from its organization in 1960 until July 1, 1966, his article is generally accorded authoritative status.

The Advisory Committee specifically cited *Potts* v. *Flax*, and Professor Kaplan specifically cited *Hall* v. *Werthan Bag Corp.*,[20] as illustrative of the appropriate use of the class action rule.[21] In both *Potts* and *Hall*, as in *Johnson* and the present case, the courts approved class actions whose scope was determined by the full reach of a policy of racial discrimination, not by only one manifestation of that policy. The Fifth Circuit's policy-based approach permits class actions to proceed, where Rule 23 is satisfied, in a manner which deals effectively with the class-based nature of employment discrimination,[22] and which satisfies the congressional goal of terminating the practices and effects of discrimination as quickly, thoroughly and efficiently as possible.

General Telephone argues that the Fifth Circuit has ignored Rule 23 in Title VII cases. To the contrary, the Fifth Circuit has applied its policy-based approach in a

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[20] Advisory Committee Note, 39 F.R.D. at 102; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. at 389 n.128.

[21] In its brief amicus curiae in support of General Telephone, Republicbank Dallas correctly observes that the "origin of the across-the-board approach was *Potts* v. *Flax*. . . ." Brief, p. 17 n.10. However, the Republicbank Dallas argues that this decision preceded the amendment of Rule 23 and contravenes the commonality and typicality requirements of the Rule as amended. *Id.* This argument illustrates the "180-degree-wrong way" approach to Rule 23 proposed by Republicbank Dallas and General Telephone. Both the Advisory Committee Notes and the authoritative article by the reporter for that Committee expressly approved *Potts* v. *Flax* as the type of class action Rule 23 was designed to permit. See n.20 *supra*.

[22] The Government has previously agreed that "[m]ost Title VII actions are by their very nature class actions, since they involve claims of discrimination on the basis of class characteristics." Memorandum for the United States and Equal Employment Opportunity Commission as Amici Curiae, *East Texas Motor Freight System, Inc.* v. *Rodriguez*, Nos. 75-651, 75-715, 75-718, p. 14. The Court's opinion in *Rodriguez* endorsed the Government's position on this issue. 431 U.S. at 405.

manner fully consistent with Rule 23. In its only en banc decision on a Title VII class action issue since *Rodriguez*, the Fifth Circuit held that the named plaintiff could not represent a class because she "has never suffered any legally cognizable injury . . . in common with the class. . . ." *Satterwhite* v. *City of Greenville*, 578 F.2d 987, 992 (1978), *vac.* and *rem.*, 445 U.S. 940 (1980). In *Satterwhite* the en banc court stated that "the continued vitality of [Rule 23] depends upon compliance with the procedural requirements of Rule 23 and the constitutional mandates of Article III." 578 F.2d at 998. The Fifth Circuit has repeatedly stressed in Title VII actions that "[w]hether a class should be certified depends entirely on whether the [proposed class] satisfies the requirements of Fed. R. Civ. P. 23." *Garcia* v. *Gloor*, 618 F.2d 264, 267 (1980); *Crawford* v. *Western Electric Co.*, 614 F.2d at 1304.

Moreover, far from applying a blanket rule approving class actions in all Title VII cases, the Fifth Circuit has often held that class actions should not be certified where specific requirements of Rule 23(a) have not been met. That court has ruled, for example, that Title VII actions could not be maintained as class actions because of a failure to satisfy the "numerosity" requirement of Rule 23(a)(1), *Garcia* v. *Gloor*, 618 F.2d at 267; *Hodge* v. *McLean Trucking Co.*, 607 F.2d 1118, 1121 (1970); the "commonality" and "typicality" requirements of Rules 23(a)(2) and (3), *Shepard* v. *Beard-Poulan, Inc.*, 617 F.2d 87, 89-90 (1980); *Armour* v. *City of Anniston*, 597 F.2d 46, 50 (1979);[23] *Camper* v. *Calumet Petrochemicals, Inc.*, 584 F.2d 70, 71-72 (1978); *Smith* v. *Liberty Mutual Insurance Co.*, 569 F.2d 325, 329-30 (1978); and the "adequacy of representation" requirement of Rule 23(a)(4), *Crawford* v. *Western Electric Co.*, 614 F.2d at 1304-05; *Wells* v. *Ramsey, Scarlett & Co.*, 506 F.2d 436, 437

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[23] Like the decision in *Satterwhite*, the Fifth Circuit's decision in *Armour* was vacated and remanded, 445 U.S. 940 (1980). See *Armour* v. *City of Anniston*, 622 F.2d 1226 (1980).

(1975). The Fifth Circuit has also determined that named representatives failed to carry their burden of demonstrating that the action should proceed on a class basis, *King* v. *Gulf Oil Co.*, 581 F.2d 1184, 1186 (1978), *Armour* v. *City of Anniston*, 654 F.2d 382, 384 (1981), and that the "standing" requirement may limit the relief to which a class is entitled, *Payne* v. *Travenol Laboratories*, 565 F.2d at 898. Finally, the Fifth Circuit has carefully instructed lower courts in using the broad array of devices available under Rule 23 to insure that Title VII class actions proceed manageably and appropriately. *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1050-52 (1975), *cert. denied*, 429 U.S. 817 (1976) (subclasses); *Penson* v. *Terminal Transport Co.*, 634 F.2d 989, 994 (1981) (notice and opt-out provisions); *Ford* v. *United States Steel Corp.*, 638 F.2d 753, 761-62 (1981) (substitution of named representatives).[24]

B. The Artificial and Inflexible Rules Proposed by General Telephone Are Inconsistent with the Purposes of both Title VII and Rule 23.

General Telephone incorrectly argues that the Fifth Circuit has misapplied the commonality, typicality and adequacy requirements of Rule 23(a). In order to correct this imagined pattern of judicial abuse, General Tele-

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[24] General Telephone also attempts to cast doubt on the impartiality of the Fifth Circuit's application of Rule 23 in fair employment cases. The company states that the Fifth Circuit "has not reversed a district court class certification based on the across the board presumption." Brief, p. 10 n.5. First, the Fifth Circuit has rarely had an opportunity to consider a defendant's claim that a district court's class certification decision in a Title VII case was improper. We are aware of only two such cases. In *United States* v. *United States Steel Corp.*, the Fifth Circuit vacated the district court's class certification and remanded for a further determination as to the appropriateness of the action proceeding on a class basis. 520 F.2d at 1050-51. The second case is the one presently before this Court. Moreover, the Fifth Circuit on numerous occasions, as indicated in the text, has ruled against a plaintiff's claim that a lower court's refusal to certify a class was improper.

phone invites this Court to apply a series of rigid rules to prohibit the maintenance of Title VII class actions in many circumstances: (1) A plaintiff who has suffered from an employer's discriminatory policy may not represent employees who have also so suffered if the plaintiff suffered from a practice defined as unlawful under a "discriminatory impact" theory while the other employees suffered from a practice defined as unlawful under a "discriminatory treatment" theory, Brief, pp. 24-25; (2) Even if the plaintiff and other employees all suffer from illegal discriminatory treatment, the plaintiff may not represent the other employees where different company managers or supervisors were responsible for the treatment, Brief, p.27; (3) Even if the plaintiff and other employees all suffer from illegal use of criteria that have a discriminatory impact and are unrelated to job performance, the plaintiff may not represent the other employees where the criteria are different, Brief, p. 26; and (4) Even if the plaintiff and prospective class members suffered from the same form of discrimination (whether discriminatory impact or discriminatory treatment) and from the same application of the discrimination (whether the same criteria or the same company manager), a plaintiff who is presently employed may not represent a class containing applicants as well as employees because there is a *potential* conflict between the interests of the plaintiff and the class. Brief, pp. 27-28.[25]

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[25] The Justice Department, while rejecting General Telephone's "conflict of interest" rule as overly restrictive, Brief, p. 19 n.17, has proposed its own rigid rule for Title VII class actions: "The named plaintiff may represent a class only if the proof he will make with respect to the employment practice he attacks is substantially probative of the discrimination allegedly practiced against the class as a whole." *Id.*, p. 16; see *id.*, pp. 18-19. The Justice Department has apparently devined new meaning in Rules 23(a)(2) and (3) since 1976, when it noted "confusion as to the interpretation of the typicality provision" and doubt as to whether "it imposes an independent requirement in addition to other provisions of Rule 23(a)" and, most importantly, noted that "[m]ost Title VII actions are by their very nature class actions, since they involve claims of

1. *The "Commonality" and "Typicality" Requirements.*

The requirements of commonality and typicality do not inexorably lead, as General Telephone would have it, to a rigid set of universal rules. The commonality requirement of Rule 23(a)(2)

> seems unnecessary, since, in addition to the prerequisites of subdivision (a), an action can be maintained as a class action under Rule 23 only if it satisfies the requirements of at least one of the three types of class actions provided for by subdivision (b). . . . [T]he existence of common questions is implicit in a finding under subdivision (b). . . .

3B *Moore's Federal Practice* ¶ 23.06-1, p. 23-171; see also Wright and Miller, 7 *Federal Practice and Procedure* § 1763, p. 609. Moreover, Rule 23(a)(2)

> does not require that all questions of law and fact raised by the dispute be common; nor does it establish any quantitative or qualitative test of commonality. All that can be devined from the rule itself is that the use of the plural "questions" suggests that more than one issue of law or fact must be common to members of the class.

Id., § 1763, pp. 603-04 (footnote omitted). See *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968).

Similarly, the "typicality" requirement of Rule 23(a)(3) does not lead to any inflexible standards. "As one court conservatively stated, there 'may be some doubt as to the precise meaning of the clause.'" 3B *Moore's Federal Practice* ¶ 23.06-2, p. 23-185; see Wright and Miller, 7 *Federal Practice and Procedure* § 1764, p. 611. It appears that the typicality requirement was "designed to buttress the fair representation requirement in Rule

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discrimination on the basis of class characteristics." Memorandum for the United States and Equal Employment Opportunity Commission as Amici Curiae, *East Texas Motor Freight* v. *Rodriguez*, Nos. 75-651, 75-715, 75-718.

23(a)(4)," *id.*, p. 612, quoting *Rosado* v. *Wyman*, 322 F.Supp. 1173, 1193 (E.D.N.Y.) (Weinstein, J.), *aff'd* on other grounds, 437 F.2d 619 (2d Cir.), *rev'd* on other grounds, 397 U.S. 397 (1970).

The requirements of Rule 23(a) should be applied in a manner consistent with the overall purposes of Rule 23: (a) to provide a mechanism for the efficient resolution of many individual claims in a single action; (b) to eliminate repetitious litigation and possibly inconsistent adjudication involving common questions, related events, or requests for similar relief; and (c) to establish an effective procedure for persons who would be unable to vindicate their rights in separate lawsuits because of the cost.[26] In addition, Rule 23 must be implemented in a manner consistent with due process, *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and with the substantive law upon which the action is based. See section II,A,2, *supra*. To apply the commonality and typicality requirements in the restrictive and inflexible manner urged by General Telephone would establish barriers to class litigation which would undermine the basic purposes of Rule 23 and would frustrate the intent of Congress.

Moreover, "[c]ommon questions of law or fact are typically present" in employment discrimination cases because such suits "are often by their very nature class suits, involving classwide wrongs." *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. at 405. As this court has emphasized, proof of discriminatory intent must "often be inferred from the totality of relevant facts . . . ." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); see *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977). Thus, contrary to the assertion of General Telephone, Brief, p. 32, a plaintiff claiming discriminatory treatment has a direct self-interest in demonstrating that other persons were similarly victimized and that other practices were affected by

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[26] *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 338-39 (1980).

discriminatory motive. See *Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973); *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 458 n.7 (1979). Even in an individual Title VII case, the plaintiff may rely upon proof of "a general pattern of discrimination." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 805; *Davis* v. *Califano*, 613 F.2d 957, 960-66 (D.C. Cir. 1979).

General Telephone is also wrong in asserting that a plaintiff whose claim depends upon proof of discriminatory treatment may not represent class members whose claims depend upon proof of adverse impact. First, the relevant proof in effect and intent cases is often quite similar. The plaintiff may establish a prima facie case of disparate impact or disparate treatment through the use of statistical evidence. See *Teamsters* v. *United States*, 431 U.S. at 339 n.20. Second, the employer's rebuttal evidence may be the same in an intent case as in an effect case. While the good faith of an employer may present a total defense in a discriminatory treatment case, evidence of good faith in a discriminatory impact case may "open[] the door to [an] equit[able]" defense. *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 422. Indeed, the court's determination of whether to apply an intent standard or an effect standard may well depend more upon the nature of the defense than upon the nature of the plaintiff's claim.[27] In attempting to establish a prima facie

[27] For example, if plaintiff shows that a company's promotional selection procedure has a significant adverse impact on black employees, the company may present evidence either that the selections were made pursuant to objective criteria or that its supervisors exercised their subjective discretion in a fair and non-discriminatory manner. There is a fine line between evidence regarding fair implementation of a subjective standard and the implementation of objective criteria. The court may well have to analyze employment practices under both intent and effect standards. See *James* v. *Stockham Valves & Fittings, Inc.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 535 n.5 (5th Cir. 1982); *Royal* v. *Missouri Highway and Transportation Comm.*, 655 F.2d 159 (8th Cir. 1981); *Clark* v. *Alexander*, 489 F.Supp. 1236 (D.D.C. 1980).

case, the plaintiff often does not know whether the case ultimately will turn on an intent analysis or an effect analysis.[25] Thus, the prudent plaintiff may present evidence establishing a violation under both standards. Third, where the plaintiff presents a prima facie discriminatory impact case which the defendant rebuts by showing that the criteria causing the impact are job related, the plaintiff may prevail by showing that the criteria are "merely [used] as a 'pretext' for discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 425, citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 804-05. "Pretext" can be demonstrated by proof of intentional discrimination. Finally, questions of remedy—e.g., the availability of back pay and retroactive seniority, and the appropriate scope of affirmative action—generally are the same regardless of the underlying theory of liability. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 418-21; *Franks* v. *Bowman Transportation Co.*, 424 U.S. at 770-80, *Teamsters* v. *United States*, 431 U.S. at 363-76.

2. *The "Adequacy of Representation" Requirement.*

The adequacy requirement of Rule 23(a)(4) insures that the absent class members will not be deprived of due process and that they will accordingly be bound by the final judgment. The adequacy issue must be examined in the context of each case. *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. at 405-06.

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[25] This uncertainty is compounded by changing standards of fair employment law. See, e.g., *Teamsters* v. *United States*, *supra* (plaintiff, following more than 30 decisions of six courts of appeals, litigated the case under an effect standard only to lose because of a failure to prove intent); *Washington* v. *Davis*, *supra* (plaintiff prevailed on an impact theory in the court of appeals but lost in this Court because of a failure to prove intent). In this term the Court has granted petitions for certiorari in two cases which raise the question whether a violation of 42 U.S.C. § 1981 requires proof of intent. *General Building Contractors Ass'n* v. *Pennsylvania*, *supra*; *Guardinas Ass'n* v. *Civil Service Commission of the City of New York*, *supra*.

General Telephone urges this Court to adopt a per se rule: Regardless of the particular facts of a case, an employee may not represent a class including applicants where there is a potential for conflict over future promotional opportunities.[29] As the Justice Department correctly points out, such an inflexible rule would virtually eliminate class litigation under Title VII. Brief, p.19, n.17. Moreover, General Telephone's position ignores the interest of black and Hispanic employees in securing a discrimination-free work environment, including their interest in eliminating discrimination against black and Hispanic applicants for employment. See section II,A, *supra*.[30]

Furthermore, the courts are "aware of the irony that a dismissal for inadequacy of representation may as a practical matter . . . result in no representation at all of the class interest." 3B *Moore's Federal Practice* ¶ 23.07 [2], p. 23-221. It is in the interest of General Telephone and other employers, but not in the interest of the victims of unlawful practices, to limit the scope of class representation by establishing rigid per se rules restricting the application of Rule 23(a)(4). The adoption of such arti-

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[29] *Scott* v. *University of Delaware*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979), cited by General Telephone, is inapposite. In *Scott*, the plaintiff took inconsistent positions with respect to his claim and the claims of the applicant class which he sought to represent. It is the "assertion of these inconsistent positions [which] necessarily forecloses any contention that [the plaintiff's] claims are typical . . . [or that he is] an adequate representative of the unnamed members of the class seeking employment." 601 F.2d at 86 (footnote omitted).

[30] General Telephone appears to assume that blacks and Hispanics will act like proverbial crabs in a barrel, pulling each other down in order to advance themselves. Is it not more reasonable to assume that minority employees would be motivated to remove all discriminatory practices, and to eliminate the threat of harm to and the implicit badge of inferiority on all minorities? If a company discriminates in its hiring policies, is it not reasonable for a minority employee to think that the discriminatory treatment might extend to the company's promotional policies as well?

ficial and inflexible rules would result in the denial of relief to victims of unlawful discrimination.[31]

The rigid rules proposed by General Telephone for the application of Rule 23(a) would frustrate the purposes of both Rule 23 and Title VII. Contrary to General Telephone's assertions, nothing in *East Texas Motor Freight* v. *Rodriguez*,[32] *General Telephone* v. *EEOC*,[33] or any

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[31] For example, persons who did not apply for jobs due to an employer's discriminatory practices may be entitled to relief under Title VII. *Teamsters* v. *United States*, 431 U.S. at 367. Rejected applicants are permitted to represent classes including persons who were deterred from applying; "if this were not the case, most such persons would go without relief entirely, since it is unlikely that one of them would sue and qualify as a class representative." *Phillips* v. *Joint Legislative Committee*, 637 F.2d 1014, 1024 (5th Cir. 1981). See also Justice Department Brief, p. 2. Under General Telephone's theory, such classes would be prohibited since there might be *potential* competition between the representative and the class for a limited number of job openings. General Telephone's rule would have the same result as a "per se prohibition of relief to nonapplicants [which] could thus put beyond the reach of equity the most invidious effects of employment discrimination. . . ." *Teamsters* v. *United States*, 431 U.S. at 367.

[32] In *Rodriguez* the Court held that, where the named plaintiffs' claims had been resolved against them on the merits prior to a decision on class certification, they were not "members of the class they purported to represent" and therefore could not maintain a class action. 431 U.S. at 403-04. See Rule 23(a), Fed. R. Civ. P. ("[o]ne or more *members of a class* may sue or be sued as representative parties" if the numerousity, commonality, typicality and adequacy requirements are satisfied) (emphasis added). Additionally, the Court held that the plaintiffs in *Rodriguez* did not satisfy the adequacy requirement of Rule 23(a)(4) because they failed to move for class certification, and because their interests directly conflicted with the interests of the proposed class members, who had voted by a large majority to reject the relief the plaintiffs were seeking. 431 U.S. at 404-05. In the present case, by contrast, plaintiff Falcon was at all times a member of his class, he moved for and obtained certification before trial, and there is no indication of any actual conflict of interest.

[33] In *General Telephone* v. *EEOC*, the Court held that the Equal Employment Opportunity Commission may maintain civil actions

other decision of this Court supports the imposition of such artificial and inflexible rules. The lower courts thus should be permitted to continue to use their sound discretion in applying Rule 23 to the cases before them.

C. The District Court and the Fifth Circuit Correctly Applied Rule 23 in this Case.

General Telephone has made no "obvious and exceptional showing of error" by either of the courts below. *Berenyi* v. *Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967).[34] To the contrary, the record in this case fully supports both the district court's class certification and the Fifth Circuit's affirmance of that certification.

General Telephone asserts that "there was no evidence . . . that the same individuals were responsible for

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seeking relief for the victims of unlawful employment practices without complying with Rule 23. 446 U.S. at 333-34. In distinguishing EEOC actions from private class actions, the Court noted that the typicality requirement of Rule 23(a)(3) "is said to limit the class claims to those fairly encompassed by the named plaintiff's claims," and that under the adequacy requirement of Rule 23(a)(4), "conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority." 446 U.S. at 330-331. Thus, while Rules 23(a)(3) and (a)(4) may well preclude a black male plaintiff, for example, from representing a class containing white females complaining of sex discrimination, the EEOC may properly bring a Title VII enforcement action on behalf of both groups. See Justice Department Brief, pp. 19-20 n.17. But the Court's opinion in *General Telephone* v. *EEOC* does not suggest that the claims of black applicants may not be "fairly encompassed" by the claims of black employees, nor does it suggest that class certification should be denied on the basis of mere speculation about possible conflicts of interest.

[34] It is not the role of this Court to sit as a second-tier appellate court "review[ing] the evidence and discuss[ing] specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1975). This Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi* v. *Immigration and Naturalization Service*, 385 U.S. at 635.

hiring and promotion decisions." Brief, p. 27. However, the record shows that the first-line supervisors have a critical role in both the hiring and the promotion systems. The employment interview conducted by the person who would be the applicant's supervisor is considered an important part of the selection process. The first-line supervisor also participates in the actual hiring decision.[35] JA 168-70. Similarly, a second-line supervisor testified that he "take[s] recommendations [for promotion to management positions] from the first line foremen," JA 86, that the "people who are promoted . . . are . . . recommended . . . by the first line supervisors," JA 87, and that employees are evaluated primarily by the first-line supervisors, JA 96. See App. 21a n.11, 36a.

Furthermore, as the district court found, the "criteria used to rate and to promote are subjective and are not based on objective criteria."[36] App. 36; see App. 22a-23a. Initial hiring is also based on subjective criteria. JA 168-70.[37] Both the hiring and the promotional processes are implemented by the overwhelmingly white supervisory and managerial workforce at the Irving Division—only one of the 66 persons in management and salaried posi-

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[35] This selection process is described in the affirmative action plan. The plan states that its "[s]election procedure will be very similar to our normal hiring procedures." JA 169.

[36] Jake Goldsten, a second-line supervisor, described the criteria used to select people for management: ". . . we go on the man's past experience, his past record, and any kind of experience he may have had relating to any type of supervisor work." JA 87. Mr. Goldsten also had a "belief" that college education might be a factor. JA 101.

[37] General Telephone asserts that the plaintiff relied "exclusively on a disparate impact theory" for proving hiring discrimination, whereas his promotional claim was based on a disparate treatment theory. Brief, p. 24. In fact, the plaintiff relied upon similar statistical evidence to support both claims, and it appears that the plaintiff did not try the claims on different theories. Transcript, Oct. 21, 1976, p. 3. As discussed in Section II,B, *supra*, the same evidence may sometimes lead to a conclusion of either disparate treatment or disparate impact.

tions is Mexican-American or black. App. 38a; Transcript, Oct. 21, 1976, pp. 204-05, 255-56, 268. Such a system with largely standardless discretion "is susceptible of abuse." *Castaneda* v. *Partida*, 430 U.S. 482, 497 (1977); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972).[88] The Fifth Circuit properly concluded that, in view of the "similarity of interests" between those Mexican-Americans denied promotion and those denied hire at the Irving Division, it was proper for the district court to certify a class including both applicants and employees.[89] App. 13a. The Fifth Circuit also affirmed the district court's limitation of the class to the Irving location. App. 14a-15a. The Fifth Circuit did not reflexively "presume," as General Telephone implies, that a class action was appropriate simply because a Mexican-American claimed national origin discrimination. Rather, the court properly applied Rule 23 to the facts of this case and concluded that the class certified by the district court was appropriate and should be affirmed.

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[88] The potential for discrimination in a subjective system is illustrated in this case. The personnel administrator, Delores Cameron, testified that the company has "stressed to supervisors continuously" the need to recruit minorities and to contact minority groups or individuals in order to "obtain applicants"; "employees were used generally to attempt to recruit minorities." Transcript, pp. 332-33. Two white supervisors, Mr. Goldsten and Mr. Sumner, testified at trial. Mr. Goldsten stated that he was "not real familiar with" the policy of General Telephone to encourage minority applicants. JA 112. In response to the question, "Have you ever been requested by the company to assist in any manner of recruiting Mexican-Americans or other minorities?" Mr. Sumner stated, "No, sir, I haven't." Transcript, p. 254. Both Mr. Goldsten and Mr. Sumner testified that they did not have any Mexican-American friends who did not work at the company. JA 103-04; Transcript, p. 253.

[89] The Fifth Circuit distinguished *Crawford* v. *Western Electric Co.*, 614 F.2d at 1304, where it had rejected an expanded class because the plaintiff did not share with the employees he sought to represent "similar functions, collective bargaining representatives, physical locations, or supervisory personnel. . . ."

CONCLUSION

The writ should be dismissed as improvidently granted. Alternatively, the Fifth Circuit's decision should be affirmed.

Respectfully submitted,

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No. 81-574

IN THE

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OCTOBER TERM, 1981

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Petitioner,

v.

MARIANO S. FALCON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE FOR REPUBLICBANK DALLAS

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BRIEF AMICUS CURIAE FOR REPUBLICBANK DALLAS

INTERESTS OF THE AMICUS

RepublicBank Dallas, a major bank located in Dallas, Texas, submits this brief pursuant to Supreme Court Rule 36.2[1] in support of the position of Petitioner General Telephone Company of the Southwest, which urges reversal of the Fifth Circuit's decision upholding the certification of a class action.

The essential issue presented here is the validity of the Fifth Circuit's approach to class certification issues in private employment discrimination cases under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e-*et seq.*), and under 42 U.S.C. § 1981. This approach, generally referred to as the "across-the-board" approach, replaces close legal and factual analysis of standing and Rule 23(a) prerequisites with a simple inquiry into whether the putative class members are

[1] All parties to this proceeding consent to the filing of this brief; appropriate letters of consent have been filed with the Clerk of the Court.

within the same protected group as the plaintiff who is alleging injury because of his protected group status. The result is broad-based class actions limited in breadth, if at all, primarily by the choice of plaintiff and his counsel as to how much they wish to attack.

Republic has a special concern in the resolution of the essential issue presented here because it has recently perfected appeal in the Fifth Circuit of a district court determination on the merits of a massive class action certified after scrupulous adherence by the lower court to the Fifth Circuit's across-the-board approach.[2] Republic's potential for meaningful review and reversal of the broad class certification at the circuit court level, which would be substantial in any circuit other than the Fifth, arguably is foreclosed unless this Court specifically instructs the Fifth Circuit that its across-the-board approach must be discontinued.

Republic's case, which raises issues far broader than the narrow question of whether an employee claiming promotion-related injury can represent a class of applicants, should reveal much to this Court about the extreme length to which the across-the-board approach can be, and has been extended. The Republic litigation was originally brought as two separate suits, filed by two black females, and consolidated into a single class action. Plaintiff Vuyanich was hired by Republic as a clerk in 1969 and was terminated at the end of her 90-day probationary period.

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[2] The decision on the merits in Republic's litigation is reported at Vuyanich v. Republic National Bank of Dallas, 505 F.Supp. 224 (N.D.Tex. 1980). A subsequent Memorandum Opinion was issued nine months later and reported at Vuyanich v. Republic National Bank of Dallas, 521 F.Supp. 656 (N.D. Tex. 1981). Opinions concerning class issues, filed prior to the decision on the merits, are reported as follows: Vuyanich v. Republic National Bank of Dallas, 409 F.Supp. 1083 (N.D.Tex. 1976); Vuyanich v. Republic National Bank of Dallas, 78 F.R.D. 352 (N.D.Tex. 1978); Vuyanich v. Republic National Bank of Dallas, 82 F.R.D. 420 (N.D.Tex. 1979). Republic changed its name in 1981 from Republic National Bank of Dallas to RepublicBank Dallas.

Her personal claim was limited to termination. Plaintiff Johnson applied at Republic for a management position or "any position available" in September, 1971. She was not offered employment, and never reapplied or worked for Republic.[3]

Applying the across-the-board approach, the District Court certified a class of all blacks and all females who were employed by Republic after February 16, 1969, or who unsuccessfully applied for employment after February 16, 1969, with Plaintiffs Vuyanich and Johnson as class representatives. The substantive issues litigated on behalf of the class included recruitment, hiring, initial placement, promotion, transfer, compensation, termination, departmental segregation, maternity benefits, training, marriage policy and dress code. The issues were limited neither in time (the liability period covered employment actions from 1969 through October, 1979, the date of trial, and Plaintiffs contend it is still continuing) nor in horizontal or vertical scope (included were all Republic's departments, all of its jobs and its entire work force, which included more than 700 job classifications and 2,400 employees on an annual basis).[4] The trial on the merits lasted twenty-four days. The issues were so vast and complex that the District Court's Memorandum Opinion, and a subsequent supplemental Memorandum Opinion, numbered 296 legal-sized pages.

The across-the-board approach in the Republic case has engendered litigation that extends far beyond the legitimate interests of the Plaintiffs, that strains the capability of the judiciary, that results in enormous and

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[3] Plaintiff Johnson applied at several Dallas banks on the same day. None offered her a job. She filed charges against each of these banks, and obtained monetary settlements from all but Republic.

[4] Certain class members, who did not file EEOC charges or receive right-to-sue letters in their own right, were permitted to intervene in the action to "bolster" the representation of the class and/or to act as subclass representatives.

excessive costs to the participants, and that leads to the result that today, thirteen years after the first Plaintiff's alleged injury, the litigation process merely has begun. Republic's interest here in reciting the circumstances of its case is to provide the Court with an even more egregious example of the application of the across-the-board approach than that encountered in *Falcon*, and to assist in the revelation of the theory's full potential for abuse.

ARGUMENT

I. Introduction and Summary of Argument.

In *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), this Court found it necessary to reverse the Fifth Circuit's extraordinary decision to certify as class representatives certain employment discrimination plaintiffs who were not members of the class, did not possess the same interest as the class, and had not suffered the same alleged injury as the class. The Fifth Circuit's certification order in *Rodriguez* had been bottomed on reasoning that was drawn from a line of cases that had developed the across-the-board theory of employment discrimination, pursuant to which plaintiffs were generally presumed to be appropriate class representatives irrespective of whether their claims bore any legal or factual resemblance to those of the putative class. In the wake of *Rodriguez*, almost every circuit court that had espoused the across-the-board approach to employment discrimination class actions issued opinions that, expressly or by clear implication, manifested a rejection of the across-the-board theory and an adherence to the principles of *Rodriguez*. The sole exception was the Court of Appeals for the Fifth Circuit, which has steadfastly persisted in its application of the now discredited across-the-board theory, making the present appeal necessary.

The fundamental flaw in the Fifth Circuit's approach is that it permits plaintiffs, acting in the guise of class representatives, to assert claims on behalf of

others based on injuries that the plaintiffs themselves have not suffered, and to seek remedies for others to which the plaintiffs themselves are not entitled. This produces serious ramifications in at least three areas. First, such claims presented by such plaintiffs simply are not justiciable, because this Court's standing cases make it quite clear that neither constitutional nor prudential components of that doctrine will countenance the adjudication of claims of putative class members where the plaintiffs and the class members do not share the same injury. Secondly, the Fifth Circuit's approach wrongly presumes the propriety of class certification based upon the notion that employment discrimination is inherently class discrimination, thus flouting the mandate of *Rodriguez* requiring courts to pay "careful attention" to the specific requirements of Federal Rule of Civil Procedure 23(a). Finally, because the across-the-board approach places in jeopardy the due process rights of absent class members, it produces an inherent instability in across-the-board class judgments that engenders a diversion of attention from legitimate issues, the promiscuous relitigation of issues and claims, and a waste of both judicial and litigant resources and energies.

II. The Fifth Circuit's Across-The-Board Approach Ignores Justiciability Requirements Of The Constitution And This Court And Impermissibly Permits A Plaintiff On Behalf Of A Class To Litigate Claims The Plaintiff Cannot Litigate On His Own Behalf.

The most fundamental error in the Fifth Circuit's across-the-board approach is that it ignores the Article III limitation on federal judicial power, and permits a plaintiff to litigate claims for relief on behalf of a class that he could not litigate for himself. Established precedent from this Court, as well as from the Fifth Circuit in other contexts, makes clear that a plaintiff must have standing to adjudicate a claim for relief on behalf of himself before a federal court has power to invoke its jurisdiction and "decide the merits" of that

dispute. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The case now before the Court aptly demonstrates this point: Mariano Falcon had no cognizable personal claim for relief against General Telephone for hiring discrimination, for he had been duly hired upon application; yet he was allowed to litigate a claim for relief of hiring discrimination on behalf of a class of unsuccessful applicants. This approach sanctions federal litigation of nonjusticiable claims, and it must be rejected.

This Court has emphasized that standing to assert a federal question is determined in relation solely to the plaintiff's personal claim for relief and his establishment of a real "case or controversy" with the defendant. As the Court said in *Warth*:

> As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. Baker v. Carr, 369 U.S. 186, 204 (1962). The Art III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . . ." Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

Warth, supra, at 498-99.

This Court also has emphasized that the plaintiff's injury must be "injury in fact," and that "abstract injury is not enough." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The necessity for "injury in fact" to the plaintiff is no less important where the claim for relief derives from an act of Congress creating a new legal right where no legally-cognizable injury existed before. Plaintiff must still demonstrate injury to the extent of "[an] indication that invasion of the statutory right has

occurred or is likely to occur . . . . Perforce, the constitutional requirement of an actual case or controversy remains." *O'Shea, supra,* at 493 n.2. *Accord, Warth, supra,* at 501.

Nor is the plaintiff's standing burden lessened when plaintiff seeks to represent a class. The plaintiff's standing must derive from his own injury in fact. It is not sufficient that he merely assert a general grievance "shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin, supra,* at 499; *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 220 (1974). Similarly, the plaintiff cannot *acquire* standing "through the back door of a class action" by predicating his alleged standing on an injury suffered by a class of persons he seeks to represent but with whom he does not share the injury. *Allee v. Medrano,* 416 U.S. 802, 828-29 (1974). Thus, failure of the plaintiff seeking to represent a class to establish personally "the requisite of a case or controversy with the defendants" must lead to a dismissal of the plaintiff's claim for relief "on behalf of himself or any other member of the class." *O'Shea v. Littleton, supra,* at 494; *Bailey v. Patterson,* 369 U.S. 31, 32-33 (1962).[5]

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[5] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), does not suggest a different result. The Court there found plaintiffs had alleged "with particularity" a direct injury to themselves. *Id.* at 211. There was no class allegation. Moreover, references in the Court's opinion inferring a congressional intention to relax the prudential component of traditional standing in that context are not pertinent to the employment discrimination claims discussed here. The Court's inference was drawn substantially from the absence of any meaningful enforcement authority to protect the statutory interests involved in Trafficante. But this Court has subsequently pointed out the profound differences in this respect between the statute discussed in Trafficante (Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3610 (1976)) and the statute at issue here (Title VII of the 1964 Act). Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 104 n.12 (1979). The Court also has noted more recently that Congress crafted the enforcement scheme of Title VII, giving to the E.E.O.C. "the primary burden

This Court's cases consistently demonstrate that not only must the plaintiff's claim for relief assert a legally cognizable injury to himself, but that the class he seeks to represent must also share in that injury with him. The Fifth Circuit's approach recognizes, at best, only half of this requirement. While it does require that the plaintiff have standing to assert his individual claims for relief under the employment discrimination statutes, it does not require that the plaintiff share in any injury to the class he seeks to represent. Thus, the Fifth Circuit rule, in effect gives birth to an entirely new species of standing—a sort of "pendent" standing—for which there is absolutely no precedent or support in the decisions of this Court. Under this new concept, the question of whether the plaintiff and the class share an injury is deemed wholly irrelevant.[6]

This unwarranted relaxation of constitutionally based standing requirements abrogates this Court's careful delineation of the role of federal courts under both constitutional and prudential limitations. It is also irreconcilable with decisions of this Court and other circuits, including the Fifth in other contexts, in which plaintiffs have been found to have standing to raise certain claims, but have been precluded on standing grounds from raising in the same proceeding class claims where the plaintiffs have not suffered the injury for which they seek redress on behalf of the class.[7]

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of litigation" and exempting the agency from several of the procedural hurdles (including Rule 23) that private litigants must face, largely "to implement the public interest." General Telephone Co. v. EEOC, 446 U.S. 318 (1980).

[6] The Fifth Circuit so stated in Falcon, 626 F.2d at 375 n.7, and in Satterwhite v. City of Greenville, 578 F.2d 987, 993-94 n.8 (1978) (*en banc*), *vacated and remanded*, 445 U.S. 940 (1980).

[7] *See*, Bailey v. Patterson, 369 U.S. 31, 32-33 (1962); Palmer v. Thompson, 391 F.2d 324, 327-29 (5th Cir. 1967), *aff'd on other grounds*, 403 U.S. 217 (1972) (plaintiffs shared injury with class re denial of use of segregated recreational facilities, but not segregated jails); Johnson v. American Credit Co., 581 F.2d 526, 532-33

The Fifth Circuit's approach perhaps can be rationalized as the product of a desire to maximize the broad remedial purposes of Title VII. But nothing in that statute suggests that Congress intended to alter this Court's interpretation of appropriate standing requirements. Indeed, the revisions to Rule 23 completed two years after Title VII was passed, which incorporated standing concepts into the class action rule, point to the contrary. See pp. 13-14, 24, *infra*. More importantly, constitutional concepts of standing and justiciability cannot be so lightly overridden. This Court has in a similar context rejected arguments for relaxing standing requirements:

> "The desire to obtain [sweeping relief] cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks." McCabe v. Atchison, T. & S.F.R. Co., 235 U.S. 151, 164 (1914).

Schlesinger v. Reservists to Stop the War, *supra* at 221-22 (brackets in original).

The rules of standing fashioned by this Court to reflect constitutional and prudential limitations have functioned so as to avoid, as much as possible, problems of finality, due process, multiplicity of litigation, and the like, in our legal system. The thrust of these rules, and the success of them, has been in the limitation of federal

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(5th Cir. 1978) (plaintiff allowed to represent class only on those claims shared by plaintiff and class); Thurston v. Dekle, 531 F.2d 1264, 1269-70 (5th Cir. 1976), *vacated and remanded on other grounds*, 438 U.S. 901 (1978) (plaintiff could not represent class in its claim for relief because they had separate claims for relief arising out of same transaction); Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 899 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978) (plaintiffs were not injured by policy sought to be challenged, and therefore had no standing to raise this claim on behalf of class); Chavez v. Tempe Union High School Dist., 565 F.2d 1087, 1094 n.10 (9th Cir. 1977) (plaintiff asserted a promotion claim on behalf of himself, but was not injured in hiring policies, had "no standing to raise this [hiring] claim" on behalf of a class).

litigation to claims in which plaintiffs have a direct and personal stake. The Fifth Circuit's approach usurps that limitation, and invites many abuses, the prevention of which has been one of the salutary effects of the Court's standing rules. See discussion of some of these abuses at part IV, *infra*. For these reasons, this Court must reject the across-the-board approach and instruct the Fifth Circuit to apply in employment discrimination cases the traditional standing criteria that permit a plaintiff to raise for a class only those claims for relief that he can raise for himself.

III. The Across-The-Board Approach To Title VII Litigation Ignores The Teachings of *Rodriguez* and Vitiates The Prerequisites To The Maintenance Of A Class Action Established By Rule 23(a).

In *Rodriguez, supra*, this Court held that a plaintiff cannot serve as the representative of a class unless he is a member of the class and unless he possesses the same interest and has suffered the same injury as the members of the class. *Id.* at 403. Further, the Court emphasized that, notwithstanding the fitness of many employment discrimination cases for class action treatment, "careful attention to the requirements of Fed Rule Civ Proc 23 remains . . . indispensible." *Id.* at 405.

The approach to class action analysis in *Rodriguez* was a clear departure from the across-the-board approach accepted in the majority of the circuits at that time. *See, e.g., Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969); *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 547-8 (4th Cir. 1975); *Senter v. General Motors Corp.*, 532 F.2d 511, 524 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *but see, Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975) (plaintiff seeking to represent class in employment discrimination case must meet all requirements of Rule 23(a)). Despite the former prominence of the across-the-board approach, the overwhelming majority of courts now embrace the "same interest/same injury" test of *Rodriguez* and heed this

Court's direction to pay "careful attention" to the specific requirements of Rule 23(a). *See, e.g., Hill v. Western Electric Co., Inc.*, 596 F.2d 99, 101-02 (4th Cir. 1979), *cert. denied*, 444 U.S. 929 (1979); *Patterson v. General Motors Corp.*, 631 F.2d 476, 480 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1988 (1981); *Golden v. Local 55, Int'l Ass'n of Firefighters*, 633 F.2d 817, 824 (9th Cir. 1980); *Scott v. University of Delaware*, 601 F.2d 76, 87-89 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); *DeGrace v. Rumsfeld*, 614 F.2d 796, 809-10 (1st Cir. 1980).

A. *The across-the-board approach cannot be squared with the same interest/same injury test enunciated in* Rodriguez.

A series of recent cases in the Fourth Circuit illustrates the very fundamental differences between the same interest/same injury test adopted in *Rodriguez*, and the across-the-board approach to class action litigation. Retreating from its earlier adoption of the across-the-board approach in *Barnett v. W. T. Grant Co.*, *supra*, the Fourth Circuit held in both *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312-13 (4th Cir. 1978), and in *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904, 906, n.3 (4th Cir. 1978), that *Rodriguez* denied a named plaintiff the right to maintain a class action with respect to "a discriminatory practice to which [he] had not personally been subjected." The application of this principle was further developed in *Hill v. Western Electric Co., Inc.*, 596 F.2d 99 (4th Cir. 1979), and *Abron v. Black & Decker* (U.S.), *Inc.*, 654 F.2d 951 (4th Cir. 1981). In *Hill* the court held that the same interest/same injury test prohibited named plaintiffs complaining of discrimination in assignments and promotions from representing a class of persons on a claim of discrimination in hiring. *Hill*, *supra*, at 102. *Accord*, *Scott*, *supra*, at 85-7; *DeGrace*, *supra*, at 809-10; and *Golden*, *supra*, at 824. Similarly, in *Abron* the court held that this test prohibited a plaintiff complaining of discrimination in denial of a transfer from representing a class of persons alleging, *inter alia*, dis-

crimination in hiring, assignment, promotion, and compensation. *Abron, supra*, at 954. *Accord, United Black Firefighters of Norfolk v. Hirst*, 604 F.2d 844 (4th Cir. 1979).[8]

This line of cases correctly focuses the same interest/same injury test on the claims of the plaintiff. As to claims alleging unlawful practices that have adversely affected the plaintiff, it is proper to inquire whether there is a class that has been subjected to the practice and, if so, whether plaintiff is an appropriate representative of that group. As to claims alleging unlawful practices that have not adversely affected the plaintiff, he is simply not a member of the class of persons capable of seeking relief from those practices. *Shelton, supra*, at 1312-13; *Belcher, supra*, at 906, n.3; *Hill, supra*, at 102; *Abron, supra*, at 954.

The Fourth Circuit's forceful analysis of the *Rodriguez* decision, limiting as it does the claims a plaintiff can

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[8] Despite the decisions in Sheldon, Belcher, Hill, Abron, and Hirst, one post-Rodriguez panel of the Fourth Circuit has held that one employee alleging a particularized injury from an identifiable employment practice may represent other employees "bringing a general challenge to workplace discrimination." Brown v. Eckerd Drugs, Inc., 663 F.2d 1268, 1275 (4th Cir. 1981). The Brown decision is plainly aberrant in that circuit, as the dissent vividly pointed out, and both misread and misapplied this Court's decision in Trafficante, *supra*, in justifying its position. Trafficante was not a class action. It merely held that the tenants of a building had sufficient personal interest in integrated housing to meet the standing requirements of Article III in a suit against their landlord alleging that the landlord refused to rent apartments in their building to black persons. Conceivably, Trafficante could be read to permit the named plaintiffs to maintain a class action on behalf of other tenants who suffered the same injury—deprivation of the benefits of living in an integrated environment. It does not stand for the proposition that the plaintiffs could represent a class possessing a different interest, *e.g.*, an interest in securing an apartment. Moreover, as the dissenting opinion in Brown points out in no uncertain terms, the decision conflicts with the Fourth Circuit's otherwise uniform adherence to the principles of Rodriguez. Brown, *supra*, at 1293-99 (Russell, J., dissenting).

pursue on behalf of a class to the claims he can pursue on behalf of himself, is reinforced by the statutory scheme of Title VII. The statutory proscriptions against discrimination are phrased in terms of discrete unlawful employment practices, rather than in terms of the monolithic, undifferentiated concept of employment discrimination seemingly envisioned by the across-the-board concept. 42 U.S.C. § 2000e-2(a) (b) (c) (d) and 3(a) (b). Charges are filed with respect to the particular employment practice or practices that allegedly have injured the charging party. 42 U.S.C. § 2000e-5(b). If a private lawsuit is subsequently filed, that suit must allege a particular claim of injury suffered by the plaintiff, and the court has jurisdiction over that claim only if the jurisdictional prerequisites with respect that claim have been met. 42 U.S.C. § 2000e-5(f). *EEOC v. General Electric Co.*, 532 F.2d 359, 365 (4th Cir. 1976); *King v. Seaboard Coast Line R.R. Co.*, 538 F.2d 581, 583 (4th Cir. 1976). Finally, injunctive relief, where appropriate, must be directed at specific employment practices. 42 U.S.C. § 2000e-5(g).

There is nothing in either the language of Title VII or its legislative history to suggest that these principles are any less applicable when the litigation vehicle is a class action. Indeed, the Fifth Circuit has held that the particular contours of relief that may be ordered in class action cases are dependent upon the specific employment practice involved. *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 897-8 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978); *see also*, Fed.R.Civ.P. 65(d) (an injunction must be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained").

Neither *Rodriguez* nor its progeny clearly articulate whether the theoretical underpinnings of the same interest/same injury test rest on the standing doctrine of Article III or on one or more of the specific criteria of Rule 23(a). As is discussed *supra*, Article III principles are necessarily implicated. Moreover, it is clear

from the language of Rule 23(a) that the prerequisites for class actions bear at least a close kinship to standing principles. As to the commonality and typicality requirements of Rule 23(a), the same interest/same injury test is most appropriately viewed as the aspect of typicality that winnows the universe of class claims that meet the commonality requirement to the narrower set of such claims that the named plaintiff can present to the court on his own behalf. As this Court recently observed in *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980), "[t]he typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims." It is equally clear, moreover, that where a named plaintiff cannot meet the same interest/same injury test, he cannot meet the adequacy requirement of the Rule. This is necessarily so because, in those instances where the plaintiff does not have a personal stake in obtaining relief from the employment practice at issue, he cannot be presumed to represent adequately absent class members who do possess such an interest.

Whatever its ultimate theoretical basis, the same interest/same injury test is a base-level requirement that identifies the broadest class that plaintiff can represent consistent with the specific requirements of Rule 23(a), and the test defines that class by reference to the employment practices that the named plaintiff alleges have adversely affected him. *Hill*, *supra*, at 101-102; *Abron*, *supra*, at 954. Contrary to the teaching of *Rodriguez*, the across-the-board approach defines the employment practices under challenge by reference to the universe of claims that a hypothetical class could raise without regard to whether the practices at issue have affected the named plaintiff in any way. In *Falcon*, for example, plaintiff's only colorable claim rests on an allegation of promotion discrimination. He had no personal interest in, nor had he been injured by defendant's hiring practices.

B. *The across-the-board approach ignores the commonality, typicality, and adequacy requirements of Rule 23.*

Where a plaintiff has met the base-level requirements of the same interest/same injury test, *Rodriguez* requires that the inquiry proceed further to the specific requirements of Rule 23(a). As Judge Phillips observed in *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980):

> [The admonition of *Rodriguez*] that "careful attention to the requirements of Fed.RuleCiv.Proc. 23 remains . . . indispensible" . . . was plainly intended to insure for . . . [employment discrimination] cases the same kind and degree of practical and conceptual analysis looking to class action allowance that the rule . . . prescribes—without differentiating by subject matter—for class actions in general. The most obvious implication, given the course of developments leading up to the admonition, was that the broad remedial purposes of Title VII and the undoubted utility and fitness of the class action device for many Title VII actions do not relieve the obligations imposed by subsections (a) and (b) of Rule 23 to inquire into the specific fitness, on its own facts, of each Title VII case for which class action status is sought.

Id. at 273 (citations and footnote omitted).

The fundamental conflict between the analysis of class actions mandated by Rule 23(a) and *Rodriguez* and the across-the-board approach is that the latter begins with the assumption that every employment discrimination case is appropriate for broad class action treatment. This assumption flies in the face of this Court's unambiguous pronouncement in *Rodriguez* that "[t]he mere fact that a complaint alleges racial or ethnic discrimination does not in itself insure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." *Rodriguez, supra*, at 405-06.

Rule 23(a) establishes four prerequisites to the maintenance of a class action, all of which presuppose a "class" that serves as the reference point for analytical purposes. Quite naturally, then, the inquiry mandated by the Rule logically begins with the question of whether there is a colorable argument that a class exists and, if so, who is included in it. *Taylor v. Safeway Stores, Inc., supra,* at 270; *Roman v. ESB, Inc.,* 550 F.2d 1343, 1348 (4th Cir. 1976); *Harriss v. Pan American World Airways, Inc.,* 74 F.R.D. 24, 36 (N.D. Cal. 1977); *see also,* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.04[1] pp. 23-111 to 114 (2d ed. 1980). Having tentatively identified a putative class for analytical purposes, application of Rule 23(a) proceeds to the four inquiries embodied in the separate requirements of the Rule: Is the class so numerous that joinder of all its members is impracticable ("numerosity"); are there questions of law or fact common to the class ("commonality"); are plaintiff's claims typical of the claims of the class ("typicality"); and will the plaintiff fairly and adequately protect the interests of the class ("adequacy")?

Functionally, the commonality, typicality, and adequacy requirements define membership of the putative class and identify the claims that the named plaintiff can pursue in their behalf. The commonality inquiry focuses attention on the homogeneity of the class, defining the limits of the class in terms of the persons who are alleged to have suffered from one or more specific unlawful employment practices uniformly applied by defendant. *Stastny, supra,* at 277-80; *Harriss, supra,* at 40-41. The typicality inquiry shifts the focus to the congruity between the claims of the named plaintiff and the claims of the class, requiring courts to define the limits of the class in terms of the claims "fairly encompassed by the named plaintiff's claims." *General Telephone Co. v. EEOC, supra,* at 330 (1980). The bounds of the class having been tentatively defined by the commonality and typicality criteria, the adequacy inquiry directs attention to the homogeneity of interests between the named plaintiff and the class, par-

ticularly to the presence or absence of antagonism between the interests of the plaintiff and the interests of the class.[9] *Scott, supra,* at 87-88.

In stark contrast to the specific analysis of commonality, typicality, and adequacy requirements mandated by *Rodriguez,* the Fifth Circuit has applied its own version of those requirements expressed in a single criterion. This criterion, applied under the rubric of "nexus", amounts to little more than wholesale judicial deference to the limits, if any, of the class described in the plaintiff's complaint. This "analysis" ignores the specific criteria of Rule 23(a), particularly typicality, and amounts to the functional equivalent of a judicial presumption that, with rare exceptions, commonality of race, sex, or national origin between the named plaintiff and the putative class will supply the requisite "nexus" for maintaining a class action.[10]

The Fifth Circuit's decision in *Payne* vividly demonstrates that the presumption in favor of class actions is generally controlling:

> Plaintiffs' action is an "across-the-board" attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of those discriminatory practices,

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[9] The adequacy requirement also necessitates an inquiry into the competence of named plaintiff's counsel. *See,* Harriss, *supra,* at 42-43.

[10] The origin of the across-the-board approach was Potts v. Flax, 313 F.2d 284 (5th Cir. 1963). Potts, a school desegregation case, was decided three years before the 1966 amendments to Rule 23, which for the first time expressly added commonality and typicality as prerequisites for the maintenance of a class action. Nine years later, citing Potts, Johnson v. Georgia Highway Express, Inc., *supra,* first applied the across-the-board approach to a Title VII case. The Johnson opinion, however, failed to address the continuing viability of that approach in light of the very substantial changes to Rule 23 adopted in 1966. Moreover, none of the cases decided since Johnson have addressed this issue.

> plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies.

Payne, supra, at 900. The *Falcon* decision demonstrates that the presumption in favor of a class is all but irrebuttable:

> It is consistent with the holding in Rodriguez and the policy of Title VII to allow a plaintiff to represent a class suffering from a common discriminatory complaint. While similarities of sex, race or national origin claims are not dispositive in favor of finding that the prerequisites of Rule 23 have been met, *they are an extremely important factor in the determination, that can outweigh the fact that the members of the plaintiff class may be complaining about somewhat different specific discriminatory practices.*

Falcon, supra, at 375 (citations omitted) (emphasis added).

Wooden application of this presumption permits named plaintiffs to satisfy the commonality requirement in respect to the full range of defendant's employment practices upon the showing that he shares the race, sex or national origin of the putative class. *See, e.g., Falcon, supra*, at 376. Worse still, the nexus concept eliminates completely the typicality requirement. To the extent the nexus analysis entails even a superficial consideration of typicality, it is invariably supplied by the observation that the plaintiff's interest in securing relief from discrimination on the basis of race, sex, or national origin is "typical" of the interests of the protected class in being free from such discrimination. *See, e.g., Long v. Sapp*, 502 F.2d 34, 42 (5th Cir. 1974). Yet, as has been discussed *supra*, the typicality analysis, correctly applied, requires a showing that plaintiff has suffered from the unlawful employment practices he seeks to challenge on

behalf of the class. *Rodriguez, supra*, at 403; *Hill, supra*, at 101-102; *Abron, supra*, at 954.[11]

Finally, the nexus approach distorts the "adequacy" requirement of the Rule by improperly subordinating concrete differences in interest between the named plaintiff and the class in the specific outcome of the litigation to their general interests in being free from discrimination. The *Rodriguez* case demonstrates this point. There, the Fifth Circuit held that the common interest of the named plaintiff and the class in being free from discrimination enabled the named plaintiff to fairly and adequately represent the class, even though a substantial portion of the class members expressly objected to the relief the plaintiff sought. *Rodriguez, supra*, at 401. In that case, this Court reversed the emphasis of the Fifth Circuit, and focused on the antagonism between the interests of the named plaintiff and members of the class in the outcome of the litigation. Nonetheless, continued reliance on the nebulous concept of nexus in the context of the across-the-board approach virtually assures continued misapplication of the adequacy requirement.

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[11] None of the few limitations imposed by the Fifth Circuit on across-the-board class actions have been based on the differences between employment practices the named plaintiff challenges on his own behalf and the employment practices he seeks to attack on behalf of the class. The principal limitation has been in instances where the named plaintiff has not suffered from discrimination at all and, thus, is not a member of the putative class. Satterwhite, *supra*, at 992. A second limitation has denied named plaintiffs who are or were supervisory employees from representing a class of hourly paid workers. This limitation is also based on the named plaintiff's lack of membership in the putative class. Wells v. Ramsay, Scarlett, and Company, Inc., 506 F.2d 436 (5th Cir. 1975). Finally, in some limited circumstances, the Fifth Circuit has permitted defendants to limit a putative class to the members of the plaintiff's protected group who sought employment, or worked in, a particular facility of the defendant. *See, e.g.*, Falcon, *supra*, at 376.

C. *The across-the-board approach to class actions under Title VII conflicts with the Fifth Circuit's application of Rule 23(a) in other substantive areas.*

Despite its steadfast adherence to the across-the-board approach in Title VII cases, the Fifth Circuit takes precisely the view urged *supra* with respect to class actions arising under substantive laws other than Title VII. In *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978), the plaintiff filed a class action raising four constitutional challenges to the Georgia prejudgment attachment statute. Relying expressly on *Rodriguez*, the court separately reviewed the different legal theories advanced by the plaintiff to determine whether they provided a proper basis for class certification.[12] One theory was rejected outright as a basis for class certification because the plaintiff never suffered the injury upon which the claim was predicated. 581 F.2d at 533. As to plaintiff's other theories, the court identified and carved out a subclass of individuals that plaintiff had standing to represent. Noting that any subclass "must independently meet all of Rule 23's requirements for maintenance of a class action," the court held:

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[12] It should also be noted that any differences in the *legal theories* advanced on behalf of the named plaintiff and the class are relevant to the certification decision in Title VII cases, as well. In Patterson v. General Motors, 631 F.2d 476, 481 (7th Cir. 1980), the Seventh Circuit observed that "[a] certifiable class claim must arise out of the same legal or remedial theory," *citing*, Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977). This point may be particularly relevant when one considers the differing burdens of persuasion and proof allocated to the plaintiff and defendant depending upon whether the claim is brought under a disparate impact theory or a disparate treatment theory. *See*, Stastny v. Southern Bell Tel. & Tel. Co., *supra*, at 274n.10 (4th Cir. 1980) (relevance of difference in burdens of proof to commonality inquiry). This is pertinent to the question of adequacy since there may be an insufficient identity of interests as between a plaintiff who must adduce one kind of proof in support of his personal claim and the putative class whose claims require wholly different evidentiary support.

> A fundamental requirement is that the representative plaintiff must be a member of the class she wishes to represent. For her third constitutional challenge, then, Johnson may represent only a subclass consisting of all persons who, like her, have had or will have property attached prior to judgment because they allegedly were removing the property from the state. No challenge may be raised in this action to the other five situations that give rise to attachment . . . [in other situations], because there are no representative plaintiffs present who have been aggrieved by them and thus who can represent the appropriate subclasses.

581 F.2d at 532-33 (citations and footnote omitted).

American Credit shows well the interplay between concepts of standing and requirements of Rule 23. Whether viewed as a pure standing requirement under Article III, as a function of proper application of Rule 23 typicality and adequacy requirements, or as a consequence of the principle that a plaintiff must be a member of the class that he purports to represent (which is in any case a feature of the interplay of Article III and the typicality and adequacy requirements of Rule 23), the outcome is the same: A plaintiff may not assert on behalf of a putative class any claims other than those he has standing to prosecute on his own behalf.

Ironically, the Fifth Circuit has expressed this view with respect to one facet of a case that in all other respects was an across-the-board action. In *Payne*, *supra*, the Fifth Circuit held that the named plaintiff did not have standing to challenge the defendant's tenth grade educational requirements for operative positions, since all three plaintiffs had attained that educational level and thus had satisfied the requirement. *Payne*, citing this Court's decision in *Warth v. Seldin*, *supra*, declared:

> "The fact that some members of the class may have had standing to raise this claim is irrelevant . . . . [T]he necessary requirement is for a *named* plain-

> tiff to have standing at the time the litigation is filed. We are unaware of any case where any federal court has reached a substantive issue absent a named plaintiff who had standing at the time the action is filed."

565 F.2d at 898 (emphasis in original), *quoting, Thurston v. Dekle*, 531 F.2d 1264, 1269-70 (5th Cir. 1976), *vacated and remanded on other grounds*, 438 U.S. 901 (1978).

That this same analysis is applicable to the assertion of hiring claims by an employee representative is virtually self-evident. If a plaintiff who has met a particular educational requirement has no standing to challenge its application to others, it necessarily follows that an employee, who by definition has been hired by the employer, is simply not a member of a class of rejected applicants and has no standing to raise hiring claims on their behalf. Other than in the Fifth Circuit, all of the circuits that have re-evaluated the across-the-board approach in light of *Rodriguez* have reached this result. Significantly, it is also the conclusion of the Fifth Circuit when it is not constrained by its own prior holdings or errant policy considerations to apply its presumption in favor of class actions under Title VII.[13]

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[13] *See*, Palmer v. Thompson, 391 F.2d 324 (5th Cir. 1967), *aff'd on other grounds*, 403 U.S. 217 (1971), where the Fifth Circuit found that plaintiffs who successfully challenged a city's segregated recreational facilities did not have standing to challenge the city's segregated jails because plaintiffs had "not shown that they are within a class whose right to a nonsegregated jail has been denied or will be denied." *Id.* at 329. In so holding, the Fifth Circuit specifically rejected the notion that the denial of rights because of race assured class membership to all persons of that race. It held: "All members of the particular race are not automatically members of the deprived class simply because they are of the same race as the members of the class. McCabe v. Atchison, T. & S.F.R. Co., 1914, 235 U.S. 151. All Negroes are not members of the class consisting of Negro prisoners and those Negroes threatened with imprisonment." *Id.* at 328 (footnote omitted).

IV. The Fifth Circuit's Across-The-Board Approach Contravenes The Due Process Interests Of Both Absent Class Members And Defendants, Impairs The Finality Of Judgments In Cases Where It Is Applied, Encourages A Multiplicity Of Litigation, And Invites Abuse Of The Class Action Mechanism.

Because the Fifth Circuit's across-the-board approach in civil rights class actions permits the adjudication of class claims by representatives who have little or no knowledge of the factual bases for the alleged claims of absent class members and no concrete interest in the resolution of such claims, the approach carries serious implications for the due process rights of absent class members and defendants alike. The absence of direct knowledge necessarily calls into question the representative's ability to present adequately the claims of the class, while the absence of interest raises doubt as to the representative's will to apply vigorously and aggressively such ability as he may have. On the other hand, across-the-board classes almost always will embrace class members who are "described," but not identified; the fundamental fairness of imposing on defendants liability to persons against whom there is "no fair opportunity to pursue pre-trial discovery, to define and refine issues in pre-trial conference or to cross-examine upon trial," has been pointedly questioned. *School Dist. of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F.Supp. 1001, 1005 (E.D. Pa. 1967).

This Court has established beyond cavil that "[a] judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980), *citing*, *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878). Indeed, the Fifth Circuit itself has recognized that "[b]efore the bar of res judicata may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consonant with due process." *Johnson v. General Motors Corp.*, 598 F.2d 432, 436 (5th Cir. 1979). Thus, the due process im-

plications inherent in the across-the-board approach necessarily impair the finality of judgments purporting to dispose of the claims, whether favorably or unfavorably, of absent class members, rendering such judgments vulnerable to collateral attack. This effect is ironic, for a major purpose behind the 1966 amendments to Rule 23 was to remedy the failure of the original Rule to provide either "an adequate guide to the proper extent of the judgments" or "measures that might be taken during the course of the action to assure procedural fairness." [14]

The due process problems posed by the Fifth Circuit's refusal to respect the limitations on justiciability enunciated by this Court, or to abide by either the letter or the spirit of Rule 23, are compounded by the fact that, as the Advisory Committee on the 1966 amendments to the Rule expressly recognized, neither Rule 23 nor any court presiding over a class action can predetermine the res judicata effect of its judgment.[15] As a result, the questions of the proper application of the mandate of Rule 23 and the satisfaction of due process requirements may be addressed anew in a subsequent action challenging the original judgment. In a case on the scope of collateral review, the Fifth Circuit has held that a reviewing court is entitled to make de novo determinations as to the correctness of the original trial court's initial conclusion that the putative representative would adequately represent the

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[14] Fed.R.Civ.P., Advisory Comm. Notes, 39 F.R.D. 98-99 (1966); *see also*, Note, *Collateral Attack On The Binding Effect Of Class Action Judgments*, 87 HARV. L. REV. 589-92 (1974) (Revisions to Rule 23 "respond[ed] to these shortcomings . . . by setting out a procedure carefully designed to satisfy the due process requirements established by Hansberry [v. Lee, 311 U.S. 32 (1940)], and by specifically providing that any judgment, whether for or against the class, shall include by "its terms all those whom the court finds to be members of the class.").

[15] Advisory Comm. Notes, *supra* note 14, at 106, *citing*, RESTATEMENT OF JUDGMENTS § 86, comment *h*, § 116 (1942).

class. *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973).

This apparently ready availability of collateral attack serves to encourage disappointed members of across-the-board classes to try again where their erstwhile champion has failed, and to put defendants to the expense and effort of a trial on issues, the litigation of which already may have consumed substantial resources in the class action. It was against precisely this potential effect of careless applications of Rule 23 that one court warned, in an early case under the revised Rule:

> [C]ourts should eschew applications of Rule 23 so expansive in scope as to permit a return to one-way intervention under a new guise. The difference between "I will intervene if our side has already won" and "If I find out our side has lost I will collaterally attack the judgment on due process grounds" may not be very great.

Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968). Heedless of this admonition, the Fifth Circuit in clinging tenaciously to its across-the-board theory effectively has converted Rule 23 (b)(2) actions into a sort of modified "spurious" class action, resurrected the evil of "one-way intervention," and thus frustrated a central objective of the drafters of the 1966 amendments to Rule 23.[16]

That these are not merely theoretical possibilities is evidenced by the fact that plaintiffs in a number of Title

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[16] Remarking that the three categories of actions under former Rule 23 ("true", "hybrid", and "spurious") had proven "obscure and uncertain," the Advisory Committee made it clear that the 1966 revisions were intended to eliminate these categories, and that "one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable will include the class . . . ." Fed.R.Civ.P., Advisory Comm. Notes, 39 F.R.D. 105-06 (1966). *See also*, In re Four Seasons Securities Laws Litigation, 502 F.2d 834, 843 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974) (purpose of Rule 23 is to prevent one-way intervention and to avoid multiplicity of suits).

VII cases in the Fifth Circuit have successfully avoided the res judicata effect of prior class decisions. For the most part, the opinions in these cases have been based either upon the conclusion that the named representatives had been unable to represent adequately all members of a diverse class, or upon a finding that the claims of the named representative had not been typical of those of the class. In *Stevenson v. International Paper Co.*, 516 F.2d 103, 111 (5th Cir. 1975), for example, the Fifth Circuit held that the plaintiffs were not barred from collaterally litigating discrimination claims that were "not identical" to previously adjudicated class claims.[17] In another Fifth Circuit decision, the court held that although notice to absent class members is not required in Rule 23(b)(2) actions, a class member who had not been provided notice was not precluded by a prior class judgment concerning the same allegedly discriminatory employment practices from litigating collaterally a claim for monetary relief. *Johnson v. General Motors Corp.*, 598 F.2d 432, 436-38 (5th Cir. 1979). The inevitably dubious finality of across-the-board judgments is wholly at odds with judicial economy, in that it promotes a multiplicity of litigation.[18]

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[17] *See also*, Grigsby v. North Mississippi Medical Center, Inc., 586 F.2d 457, 461-62 (5th Cir. 1978); Hebert v. Monsanto, 576 F.2d 77 (5th Cir.), *vacated on other grounds*, 580 F.2d 178 (1978); Hines v. Olinkraft, Inc., 413 F.Supp. 1360 (W.D.La. 1976). Decisions in other circuits also have permitted attacks on the finality of class action judgments. Lewis v. Phillip Morris, Inc., 419 F. Supp. 345, 351-53 (E.D.Va. 1976), *vacated on other grounds sub nom.*, Lewis v. Tobacco Workers International Union, 577 F.2d 1135 (4th Cir. 1978); Dickerson v. United States Steel Corp., 582 F.2d 827, 830-31 (3d Cir. 1978).

[18] It is also possible, of course, that the dubious finality of across-the-board judgments could redound to the detriment of absent class members as well as defendants. One court has declined to permit a civil rights class member to assert in his favor the res judicata effect of a favorable Rule 23(b)(2) class judgment, reasoning that to hold otherwise would give

> absent members of the class two bites at the apple at the expense of the defendant. For if a court rules on the merits

Furthermore, the across-the-board approach places temptation in the path of employment discrimination plaintiffs' counsel. The assertion of a broad-based class claim may enhance settlement leverage on the defendant,[19] and the additional time and effort that will be entailed in the disposition of the myriad procedural issues attendant upon such an action hold the promise of substantial enhancement of the ultimate award of attorneys fees.[20] This makes it likely that a significant motivating factor in the invocation of the Rule 23 mechanism will be unrelated to the interests that the Rule was crafted to serve.

Considerations of sound judicial and public policy, therefore, fairly cry out for the eradication of the Fifth Circuit's aberrational approach to employment discrimination class actions, a restoration of the sound constitutional and prudential principles embodied in the doctrine of standing, and a reaffirmation of the sensible policies underlying amended Rule 23 as articulated by this Court

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> in favor of the class, the absent members can reap the benefits of such a decision. But if the court should rule against the class on the merits, then . . . they can argue that they were not adequately represented.

Pasquier v. Tarr, 318 F.Supp. 1350 (E.D.La. 1970).

[19] As defendants become increasingly aware of the finality problems in the across-the-board approach, however, precisely the opposite effect may be produced. There may be little inducement to settle even meritorious class claims where the protection against future litigation by absent class members is beclouded by doubt. In any event, the certification of an across-the-board class introduces into the litigation an element of uncertainty wholly extraneous to the legitimate issues in the litigation. The mere existence of such a factor is likely to be very distracting as parties and counsel assess the prospects of the litigation, and to compound the difficulty of attaining a resolution short of trial. In this way, it may engender needless litigation in cases that might have been settled, resulting in a wasteful expenditure of severely taxed judicial resources.

[20] The fee enhancement potential of an across-the-board class claim was recognized by the Fourth Circuit in Abron v. Black & Decker (U.S.), Inc., *supra*, at 955 (4th Cir. 1981).

in *Rodriguez*. The cost of the failure to do so, in terms of the stability of judgments, avoidable strain on already overtaxed judicial resources, and the corruption of the purposes of Rule 23, would be high indeed.

CONCLUSION

For the foregoing reasons, the Fifth Circuit's decision to permit Mariano Falcon, an incumbent employee, to represent a class of rejected applicants for employment must be reversed. Falcon has no standing to prosecute the claims of the class. Moreover, Falcon does not possess the same interest nor has he suffered the same injury as the members of the class are alleged to have suffered. Whether the same interest/same injury test enunciated in *Rodriguez* is a standing test under Article III or a base-level requirement for class certification under Rule 23(a), the test prohibits a named plaintiff from representing a class of persons seeking relief from employment practices that have not disadvantaged the named plaintiff in any way.

Moreover, the implications of the across-the-board approach extend far beyond the relatively narrow facts of the case presently before the Court. The far-reaching scope of across-the-board litigation permits one or two plaintiffs, armed with nothing more than tenuous allegations of limited and discrete injuries to themselves, to litigate the potential claims of an employer's entire workforce and applicant pool on every conceivable employment practice over a period of several years. Republic has itself been subjected to just such a proceeding. See *supra*, pp. 1-4. While the scope may vary from the relatively narrow as in *Falcon*, to the gargantuan as in Republic's case, the logical and legal defects in the across-the-board approach remain the same. Whatever may have been its presumed justification in the past, the Fifth Circuit's theory simply cannot provide an acceptable analytical framework for class certification decisions in the wake of *Rodriguez*. It is imperative that this Court soundly

repudiate this presumption in favor of class actions and return the Fifth Circuit to the conscientious application of the specific criteria of Rule 23(a), the doctrine of standing, and principles of due process that has characterized the post-*Rodriguez* decisions in an overwhelming majority of jurisdictions elsewhere.

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No. 81-574

In the Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
PETITIONER

v.

MARIANO S. FALCON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an incumbent employee alleging that an employer discriminates on the basis of race may maintain a Title VII class action which includes in the class both incumbent minority employees and unsuccessful minority applicants.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Both the Attorney General and the EEOC are responsible for enforcement of Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000e-5, 2000e-6. Title VII is also enforced through private lawsuits, 42 U.S.C. 2000e-5, which provide an important complement to federal enforcement efforts. The federal government therefore has an interest in the development of proper standards to govern those private Title VII actions.

It is our experience that private Title VII cases alleging discrimination in hiring are more often filed by incumbent employees than by unsuccessful applicants. Many applicants are unaware of the basis for an employer's hiring decision, and an applicant's brief contact with the employer is unlikely to disclose to the applicant the possibility of racial discrimination. The extensive investigation that precedes a government suit is far more likely to discover hiring discrimination, and such suits are thus more likely to address hiring issues. Accordingly, any decision of this Court regarding the authority of incumbent employees to litigate hiring issues may well affect the government's future litigation. In addition, since the government as an employer is subject to private suit under Title VII, 42 U.S.C. 2000e-16, the decision in this case will affect the federal government as a Title VII defendant.

STATEMENT

A. Procedural History

This class-action case arises out of a complaint filed on April 3, 1975, charging petitioner with discrimination in employment against Mexican-Americans (R. 2).[1]

In his complaint, the named plaintiff, Mariano S. Falcon, sought to represent a class of Mexican-Americans who were employed by, "or who might be employed" by, petitioner (R. 1). After completion of discovery, Falcon moved to certify a class consisting of (R. 42, 51):

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[1] References to the record on appeal are designated "R"; to the separately paginated trial transcript "Tr."; and to the exhibits "Exh." ("Exh. B-8" refers to Exhibit B, at 8).

> all Mexican American hourly employees who have been employed, are employed, or may in the future be employed, but also, all those Mexican Americans who have applied or who would have applied for employment had the Defendant not practiced racial discrimination in its employment practices.

On February 2, 1976, the district court certified a class of employees "who are employed and employees (sic) who have applied for employment in the Irving Division of the Defendant company, and no other division" (Pet. App. 48a; R. 52). In so doing, the court limited the geographic scope of the class to petitioner's Irving Division, where Falcon worked. The court also eliminated those who had not actually applied for employment.

On February 20, 1976, petitioner moved for reconsideration of the class certification, arguing that Falcon was not an adequate class representative for applicants not hired (R. 95, 101-102, 106). The motion was summarily denied (Pet. App. 50a; R. 146).

After a brief trial which commenced on October 21, 1976, the district court found that there had been no discrimination in hiring against Falcon individually, but "there should be changes" in petitioner's affirmative action program that might require expanding the class (R. 176; Tr. 385). Subsequently, Falcon moved to expand the class to include all Mexican-Americans who are employed by petitioner as well as those who have applied for employment with petitioner in all divisions "so that affirmative action relief * * * will be consistent with the class action aspects of this litigation" (R. 204). Petitioner opposed any expansion on the grounds that no evidence had been presented concerning any division other than the Irving Divi-

sion (R. 196), and that the evidence that had been adduced did not support the class already certified (R. 273-275).

On March 22, 1977, the court issued its "Findings and Conclusions". It held that there had been discrimination in promotion as to the named plaintiff and discrimination in hiring as to the Mexican-American applicants in the class (Pet. App. 34a, 37a). However, the court found that there had been no discrimination as to promotions of employees in the class (Pet. App. 40a). Subsequently, petitioner undertook to locate and identify Mexican-American job applicants who had been discriminated against at the Irving Division (R. 355). On September 18-19, 1978, the trial court held a hearing on the remedy phase of the case and made extensive findings as to the amount of back pay due each of the members of the class who had requested it (Pet. App. 53a-64a). On October 20, 1978, the district court ordered petitioner to pay $39,097.99 in back pay (R. 550) and $28,827.50 in attorneys' fees, and to accelerate its affirmative action plan (*ibid.*). Motions to amend the findings and for a new trial were subsequently filed by both sides and were summarily denied (R. 620, 621).

On appeal, the court of appeals upheld the class certification, but remanded the case for further fact finding on whether there had been discrimination in hiring. In addition, the court of appeals concluded that the original claim of discrimination in promotions filed with the EEOC was broad enough to encompass discrimination in hiring (Pet. App. 15a-17a).

Petitioner then applied for a writ of certiorari. On April 6, 1981, this Court vacated the judgment of the

court of appeals and remanded the case for further consideration in light of its decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

The court of appeals accordingly remanded the case to the district court, but reinstated portions of its original decision dealing with hiring claims and the evidentiary rulings below because they were "non-*Burdine*" issues (Pet. App. 1a-2a). On June 24, 1981, the court of appeals further specified the "non-*Burdine*" issues by also reinstating other portions of the original opinion including that which addresses class certification.

On December 7, 1981, this Court granted the company's second petition for a writ of certiorari, challenging only the decision to certify a class that includes both incumbent employees of petitioner and unsuccessful applicants for employment.

B. Facts

Falcon is a Mexican-American who has worked for petitioner since July 1969 (Pet. App. 4a-5a). He was originally hired through an affirmative action program,[2] and after a training period, began working as a groundman[3] (Pet. App. 5a, 35a). Within one month, Falcon was promoted from groundman to lineman (*ibid.*). This promotion took place within

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[2] While petitioner continues to operate an affirmative action program (Exh. B-8), the special recruitment and training program (Operation Attainment) through which Falcon was hired was in existence only during 1969 (Tr. 215).

[3] At trial and in the affirmative action plan, the positions were referred to as groundman, lineman, and lineman in charge (Tr. 43-45; Exh. B-8). The district court referred to these same positions as Ground Worker, Line Worker, and Line Worker-In-Charge (Pet. App. 35a).

the three months required for the initial appointment to lineman under petitioner's affirmative action plan (Exh. B-8). Within his first year, Falcon was further promoted to lineman in charge (Pet. App. 5a). In October 1972, he applied for a promotion to field inspector, a management position. He did not receive this promotion, although several non-Mexican-Americans with less seniority than Falcon had earlier received promotions to management positions (*ibid.*).

At trial, respondent produced evidence that he had taken a number of company-sponsored training courses (Tr. 53-57, 105), had repeatedly received letters of commendation from his superiors (Tr. 53-57, 88-92), was the equal of those who had been promoted (Tr. 248-249), but had nonetheless not been promoted to a management level position (Tr. 63-66). In addition, he presented statistical evidence that for two years between 1972 and 1976, petitioner hired a smaller percentage of Mexican-Americans than their proportion of the local labor force (Tr. 133-135).[4]

Petitioner produced evidence to show Falcon had received administrative discipline on several occasions (Tr. 167-168, 184-185, 201, 211, 216-218), and that he had once declined a promotion when it was offered

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[4] The statistical evidence proffered by the respondent for hiring in the Irving Division shows (Tr. 133-138; Pet. App. 26a):

	White	Mexican-Americans
1972	19	0(0%)
1973	59	4(6%)
1974	26	6(19%)
1975	27	3(11%)
1976	8	0(0%)

5.24% of the Dallas-Fort Worth area labor force was Mexican-American during this period (Pet. App. 23a).

(Tr. 110-113). In addition, petitioner attempted to show that the others promoted ahead of Falcon were more qualified than he was (Tr. 118-120, 174-177, 192), and that Falcon was not particularly well qualified for the promotion (Tr. 98-100, 186-188, 228-233). With respect to the class allegations, petitioner produced statistical evidence of its affirmative action program (Tr. 294-316; Exh. B-8), demonstrating among other things that for some years it had hired larger percentages of Mexican-Americans as a proportion of applicants than whites (*ibid.*)[5] and that it had hired substantial numbers of blacks in the period in question, thereby eliminating vacancies that it might otherwise have filled with Mexican-Americans (*e.g.*, R. 343). In addition, petitioner showed that on the average a Mexican-American employee received his first promotion in 8.28 months while a white employee received his first promotion after 14.91 months (Tr. 292). Petitioner also demonstrated that the Irving Division has been divided since Falcon began working there (Tr. 215), with the result that thereafter there were fewer management and entrance level job openings (Tr. 257).

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[5] The evidence proffered by petitioner, for hiring in the Irving Division, showed (Tr. 310-315):

YEAR	WHITE		SPANISH SURNAMED		TOTAL*	
	Applicants	Hired	Applicants	Hired	Applicants	Hired
1973	1554	155(10%)	47	8(17%)	1757	202(11.5%)
1974	1612	53(3.3%)	53	9(17%)	1838	68(3.7%)
1975 thru 7/30	579	4(.7%)	29	3(10.3%)	727	16(2.2%)

* Totals include blacks and other applicants, as well as white and Spanish-surnamed applicants.

C. Opinion of the District Court

The district court held that petitioner did not discriminate against Falcon in connection with his hiring (Pet. App. 37a),[6] but did discriminate against him in denying him a promotion (*ibid.*). The court found that the work ratings given Falcon and those employees who were promoted "were very similar" (*ibid.*). In addition, the court found Falcon had more seniority than any of the others at the time they were promoted (Pet. App. 36a-37a).

With respect to the class claims, the court found that petitioner practiced discrimination against the class in hiring, but not in promotion (R. 287). The court found that employees were selected for promotions for hourly paid positions on the basis of seniority, previous experience and training (Pet. App. 36a). Promotions to salaried management positions were made by management on the basis of subjective criteria (*ibid.*). The court made no findings as to who hired new employees or what subjective criteria were used in hiring. The court did find, however, that in 1972, 20 Caucasians and no Mexican-Americans were hired at the Irving facility, and in 1973 155 (76.7%) whites and 8 (4%) Mexican-Americans were hired (Pet. App. 39a).[7] The court also found that at approximately the same time, in 1972, Mexi-

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[6] In the complaint, Falcon did not claim to have been personally discriminated against in hiring; he claimed only that he was discriminated against in being denied a promotion (Tr. 3).

[7] Notations after each of these findings in the district court's order indicate that the court accepted the figures put forward by respondent for 1972 and petitioner for 1973 (Pet. App. 39a).

can-Americans constituted 1.22% of the employees at the Irving facility and 5.24% of the labor force in the Dallas-Fort Worth area (*ibid.*).

The court ordered petitioner to take steps to "accelerate" its affirmative action plan and declared that those class members who had applied for work but were denied it were entitled to compensation (R. 288-292; Pet. App. 40a). The court also declared that Falcon was entitled to recover compensation for having been discriminated against by petitioner's promotion practices (R. 285). In addition, the court denied respondent's motion to expand the class (R. 293).

D. Opinion of the Court of Appeals

Applying its "across the board" rule, *Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895, cert. denied, 439 U.S. 835 (1978), the court held that an employee complaining of one employment practice may represent others complaining of other discriminatory employment practices "if the plaintiff and the members of the class suffer from essentially the same injury" (Pet. App. 13a). The court added that this rule was consistent with the Title VII policy of permitting a single plaintiff to represent a class suffering from a "common discriminatory complaint" (*ibid.*). The court said, however, that the common claim of national origin discrimination is not dispositive of the class certification issues, although it is an "extremely important factor" (*ibid.*). The court said Falcon showed more than "an alliance based simply on the same type of discriminatory claim"—discrimination against Mexican-Americans (*ibid.*). "He also showed a similarity of interests based on job location, job function and other considerations" (*ibid.*). The court of appeals also rejected Falcon's

contention that the district court abused its discretion in not extending the class to all of petitioner's Mexican-American employees and applicants, not just those at Irving, because each of the divisions conducts its own hiring (Pet. App. 14a-15a).[8]

The court ruled that Falcon made out a prima facie case under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), including adequately demonstrating that he had the qualifications for the position he was seeking. In response to petitioner's explanation that others were more qualified, the court of appeals said that the district court was not clearly erroneous in concluding that Falcon was as qualified as the persons who were promoted and that the explanation was merely pretextual (Pet. App. 18a-23a).

The court remanded, for further fact findings, the district court's conclusion that there was discrimination in hiring. While the district court made findings as to the number and relative proportion of Mexican-Americans hired in 1972 and 1973, it made no findings despite proffered evidence, concerning 1974 and 1975. The court of appeals remanded for evaluation of plaintiff's and defendant's statistics, and explanation of why labor force statistics were relied upon

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[8] The court of appeals found that the district court had jurisdiction to hear the case because Falcon's original charge filed with EEOC, which complained of discrimination in promotions and not hiring, supported an investigation of hiring discrimination by the same employer. Applying its holding in *Sanchez* v. *Standard Brands Inc.*, 431 F.2d 455 (1970), the court of appeals ruled that the district court has jurisdiction over both claims when they are "reasonably" related (Pet. App. 15a-17a).

and applicant flow data were not (Pet. App. 23a-28a).*

SUMMARY OF ARGUMENT

The issue in this case is whether incumbent minority employees and unsuccessful minority applicants, all of whom claim that an employer discriminates, may be joined in one class action. Rule 23, Fed. R. Civ. P., is intended to conserve judicial resources by permitting the consolidation into one action of all claims that are so closely related that a common trial is fair to all parties. Rule 23 insures this relationship between claims by requiring that the consolidated claims must be based on a common question of fact or law.

In upholding certification of the class of incumbent minority employees and unsuccessful minority applicants in this case, the court of appeals relied on its rule that in Title VII cases a plaintiff may make an "across the board" attack on racial discrimination in employment practices. The court of appeals' rule is too broad. Employment discrimination may be manifested in many ways, and practices are not always

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* Petitioner argued that the district court at the remedy stage had improperly allocated the burden of proving that class members were qualified for available openings and had improperly found that the company's policy of disposing of applications after three months without informing applicants exacerbated the discrimination. In light of its earlier decision to remand the issue of class action hiring claims for further findings of fact, the court of appeals declined to rule on these issues until the trial court explained why it found discrimination and "why it defined the class in the way it did" (Pet. App. 30a-31a). The court of appeals also held that it could not review the sufficiency of evidence with respect to back-pay awards for the class until the district court made further findings. However, it upheld Falcon's back-pay award (Pet. App. 31a-33a).

so similar that proof of discrimination in one employment practice necessarily raises an inference of discrimination in another. The commonality requirement focuses on similarity of proof—direct or inferential—and thus requires an ad hoc inquiry in each case.

While there are circumstances where class actions in Title VII cases may include both applicants and employees, this is not such a case. In this case there was no similarity of proof between the named plaintiff employee and the class of applicants and the proffered proof demonstrated no relationship between petitioner's hiring and promotional practices.

ARGUMENT

I. CLASS ACTIONS ARE INTENDED, IN PART, TO CONSERVE JUDICIAL RESOURCES BY CONSOLIDATING RELATED INDIVIDUAL CLAIMS INTO ONE ACTION

Class actions are intended to promote judicial economy and efficiency. They do so by consolidating into one lawsuit all claims which, because they are similar to the claim the named plaintiff presents, would be substantially affected, were they all in one suit, by the outcome of the named plaintiff's case. The theory is that a class action is fair to all persons aligned with plaintiff; since all are "parties" to the suit, if the suit is successful all will be equally entitled to appropriate relief. The class action is said to be fair to the defendant: since all persons to whom the defendant owes a duty litigate that duty in one suit, the defendant's obligations to all will be the same. See *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1321-1322 (1976), 3B *Moore's Federal Practice* ¶ 23.45[2] (Supp. 1980-1981) (hereinafter cited as "*Moore's*"). Judicial economy is advanced by avoiding many lawsuits that would, in

large measure, duplicate the evidence presented in the initial suit. See *Developments in the Law, supra*, 89 Harv. L. Rev. at 1322.

Section (a) of Rule 23 establishes several requirements for the maintenance of a class action. These requirements both aid the court in defining the class, and insure that the named representative will adequately protect the rights of the persons whose claims are at issue. *Moore's, supra*, at ¶ 23.06-2.[10]

Subsection (a)(2) of Rule 23 states that a plaintiff may sue as representative of a class only if "there

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[10] Subsection (a)(3) of Rule 23 requires that the claim of the class representative be "typical" of that of the class, and (a)(4) requires the court to determine whether the class representative "will fairly and adequately protect the interests of the class." These sections recognize that class actions are an exception to the usual rule that a litigant represents only himself, and reflect the fact that due process requires that a person whose rights may be litigated by another is entitled to proper representation. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975); *Developments in the Law, supra*, 89 Harv. L. Rev. at 1472-1475; *Moore's, supra*, at ¶ 23.07[1]. The "typicality" requirement insures that the class representative is actually a member of the class he purports to represent, *Donaldson* v. *Pillsbury Co.*, 554 F.2d 825, 830-832 (8th Cir. 1977). The "adequacy of representation" qualification insures that the named representative, and his counsel, will vigorously litigate the case (*Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir. 1975)), and that there is no conflict between the interests of the representative and those of the class. *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980).

We submit that the class allegation fails here because respondent did not establish the existence of a class, because he failed to show that the alleged class members shared an interest in a common question of fact or law. We accordingly do not believe that the Court need consider whether respondent would be an appropriate class representative if the existence of the class had been shown.

are questions of law or fact common to the class." The identification of questions "common" to all members of the proposed class serves to establish the perimeters of the class claim.[11] It also serves to insure that the action will promote judicial economy. See, *e.g.*, *Hebert* v. *Monsanto Co., Texas City, Tex.*, 576 F.2d 77 (5th Cir. 1978). As long as the claims of all members of the class turn to a substantial degree on circumstances all members share, the class suit will, in the long run, eliminate duplicative individual litigation.

Careful adherence to th 'common question" inquiry is required if a court is to act in a manner consistent with the purposes of Rule 23. Cf. *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 405 (1977). Otherwise, the court will be presented with issues that are unrelated to the claim of the class representative, resulting not in the ultimate saving of judicial resources, but in the use of these resources to consider issues about which the original suit did not require a decision.[12]

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[11] Section (b) of Rule 23, identifying the circumstances in which a class action is appropriate, requires a similar inquiry to identify common questions of law or fact (*e.g.*, Rule 23(b)(3)). See *Moore's, supra*, at ¶ 23.06-1.

[12] It does not change the analysis to phrase the inquiry in terms of the named plaintiff's standing to raise the claims of the class (see, *e.g.*, *Hill* v. *Western Electric Co.*, 596 F.2d 99, 107 (1979), Lay J., concurring). A plaintiff has no standing to complain of discriminatory practices when it is clear that he has himself suffered no discriminatory injury. See *East Texas Motor Freight System, Inc.* v. *Rodriguez, supra*, 431 U.S. at 403-404. But a person who allegedly has been so injured has standing to raise his own claim, and, if he meets the requirements of Rule 23, to act as the representative of those with claims that involve a common question.

II. IN APPROVING THE CLASS CERTIFICATION BASED ON THE THEORY THAT TITLE VII AUTHORIZES "ACROSS THE BOARD" CLASS ACTIONS, THE COURT OF APPEALS FAILED TO INSURE THAT THE CLAIMS OF EMPLOYEES AND APPLICANTS SHARED A COMMON QUESTION OF FACT OR LAW

The court of appeals held (Pet. App. 12a-13a) that the claims of unsuccessful applicants were similar enough to those of the named plaintiff, an incumbent employee, to permit the designation of a class including both applicants and employees. The basis for the court's holding that the class claims were sufficiently "similar" was the Fifth Circuit's rule permitting an employee to make an "across the board" attack on discriminatory employment practices in a single class action (Pet. App. 12a-13a).

As the court of appeals explained this rule (Pet. App. 13a), claims based on alleged discrimination by an employer against an identifiable racial (or sexual or national origin) group, although "not dispositive in favor of finding that the prerequisites of Rule 23 have been met, * * * are an extremely important factor in the determination, that can outweigh the fact that the members of the plaintiff class may be complaining about somewhat different specific discriminatory practices." In *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969), the court held that an allegation of racial discrimination against blacks was a "common question" uniting the claims of black employees. Later cases approving the "across the board" Title VII class action have concluded that class actions were to be liberally granted in Title VII cases on the theory that Congress recognized, in enacting Title VII, that class actions were a particularly appropriate means of

litigating questions of discrimination. See, *e.g.*, *Gay* v. *Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1333-1334 (9th Cir. 1977).

We submit that the "across the board" rule gives insufficient weight to the purposes of Rule 23. Although racial discrimination is class based, even in Title VII cases "[c]areful attention to the requirements of Fed. Rule Civ. Proc. 23 [is] * * * indispensable." *East Texas Motor Freight System, Inc.* v. *Rodriguez, supra*, 431 U.S. at 405.[18]

The commonality requirement focuses on similarity of proof. The named plaintiff may represent a class only if the proof he will make with respect to the employment practices he attacks is substantially probative of the discrimination allegedly practiced against the class as a whole. Each case thus requires an ad hoc determination of whether the asserted claims, and the proof to be offered in support of them, are sufficiently similar to warrant consideration in a class action.

Where a plaintiff expects to establish direct proof of a general policy of discrimination, he may represent others alleged to have suffered as a result of that policy—whether expressed in hiring, promotion, or other employment conditions. See, *e.g.*, *Johnson* v.

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[18] Although in *East Texas Motor Freight System, Inc.* v. *Rodriguez, supra*, this Court vacated an order upholding an applicant-employee class action, that decision does not control this case, because it turned on the fact that the class was certified after the named representatives were found not qualified for the jobs they sought, and thus were not adequate representatives for the class they proposed to represent. In the present case, however, there was a timely class certification and the named plaintiff was found qualified with a claim typical of those in the class. The record here does not support an argument that Falcon was not an adequate representative for the class.

Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969). But most often such a policy can not be directly proven, and can be inferred only after proof of discrimination in one or more employment practices. In such a case, the court must evaluate the extent to which proof by the named plaintiff will duplicate proof or raise inferences probative of discrimination against others.[14]

In *Stastny* v. *Southern Bell Telephone & Telegraph Co.*, 628 F.2d 627, 277 (4th Cir. 1980), the court approved the factors outlined in *Harriss* v. *Pan American World Airways, Inc.*, 74 F.R.D. 24, 41 (N.D. Cal. 1977) as appropriate for consideration:

> (i) What is the nature of the unlawful employment practice charged—is it one that peculiarly affects only one or a few employees or is it genuinely one having a class-wide impact.
>
> (ii) How uniform or diverse are the relevant employment practices of the employer, considering matters such as: size of the work force; number of plants and installations involved; extent of diversity of employment conditions, occupations and work activities; degree of geographic dispersion of the employees and of intra-

[14] While a court, when determining whether a class action may be maintained, may not determine the merits, see *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), neither is the court forced to rely only on the pleadings. The court may hold a hearing at which the class nature of the allegations, and the ability of the named representative to litigate the case, may be developed. See, *e.g.*, *Huff* v. *N.D. Cass Co. of Alabama*, 485 F.2d 710, 712-713 (5th Cir. 1973) (en banc); *Chateau de Ville Productions, Inc.* v. *Tams-Witmark Music*, 586 F.2d 962, 964-966 (2d Cir. 1978). If the anticipated evidence is not forthcoming at trial, the class may be decertified. See *Stastny* v. *Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 274-276 (4th Cir. 1980).

company employee transfers and interchanges; degree of decentralization [sic] of administration and supervision as opposed to the degree of local autonomy.

(iii) How uniform or diverse is the membership of the class, in terms of the likelihood that the members' treatment will involve common questions.

(iv) What is the nature of the employer's management organization as it relates to the degree of centralization and uniformity of relevant employment and personnel policies and practices.

(v) What is the length of the time span covered by the allegations, as it relates to the degree of probability that similar conditions prevailed throughout the period.

We agree that consideration of these factors is an appropriate way to make the evaluation required by Rule 23.

This approach suggests that a class including both applicants and employees will be appropriate where the claim is that both hiring and promotion decisions are made by applying the same discriminatory criteria,[15] or where, in a situation like that alleged in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, *supra*, 431 U.S. at 397-399, an employer hires minorities only for the lowest level positions (or into a segregated job line), and apart from filling these jobs

[15] This is particularly so if the decisions are made by the same individual. Even if they are not, a class certification may be appropriate where similar employment decisions are made by a number of officials. Cf. *Blackie* v. *Barrack*, 524 F.2d 891, 903 n.19 (9th Cir.), cert. denied, 429 U.S. 816 (1975) (in a securities case, class consisting of persons complaining of similar misrepresentations in a number of documents properly certified).

refuses to hire or transfer minority applicants.[16] In those situations, although the minority incumbent will complain of discrimination in job assignment or a lack of promotional opportunity, and the applicant will complain of discrimination in hiring, proof of the claims of either will require the establishment of the same employment practice. As stated in *DeGrace* v. *Rumsfeld*, 614 F.2d 796 (5th Cir. 1980), "representation [by employees of nonemployees] may be proper when * * * the challenged hiring procedures are closely akin to the very transfer or promotion procedure about which the plaintiff-employee complains." 614 F.2d at 809; see also *Young* v. *Edgcomb Steel Co.*, 363 F. Supp. 961 (M.D. N.C. 1973), modified on other grounds, 499 F.2d 97 (4th Cir. 1974).[17]

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[16] We note that one of the applicants here applied for a field inspector position (Pet. App. 56a) and Falcon's complaint turned on the petitioner's refusal to promote him to such a position (Pet. App. 5a).

[17] We disagree with the petitioner's suggestion (see Pet. 13-16) that because there can sometimes be a conflict between incumbent employees and unsuccessful applicants, incumbents should always be disabled from representing a class that includes applicants. In *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980), this Court noted that "conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes." On the other hand, any class that includes a large number of applicants or employees may present competition between class members for a limited number of positions. This competition does not in itself amount to a "conflict" for purposes of certifying a class action; if it did, there could never be class actions where the number of class members exceeded the number of jobs or promotions available. Instead, as this Court acknowl-

In contrast, a broad class including both employees and applicants would be inappropriate if the hiring practices and the practices affecting the employees involved significantly different lines of proof (see *Holmes* v. *Berglund*, No. 80-1424 (6th Cir. Jan. 5, 1982))—for example, where the employment and hiring decisions are made by distinct autonomous establishments. Cf. *Doninger* v. *Pacific Northwest Bell, Inc.*, 564 F.2d 1304 (9th Cir. 1977); *Stastny* v. *Southern Bell Telephone & Telegraph Co.*, *supra*.

In this case, which was litigated below on the basis of the Fifth Circuit's established "across the board" rule, the complaint did not allege and the proof did not establish similarity of claims sufficient to justify a class action covering both incumbents and applicants.[18] While the court of appeals stated (Pet. App. 13a) that the claims of Falcon and of applicants for employment "showed a similarity of interests based on job location, job function, and other considerations," it gave no explanation for this finding. The court of appeals affirmed the district court's decision

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edged in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772-774 (1976), and *Teamsters* v. *United States*, 431 U.S. 324, 361, 371-372 (1977), once liability to the class is established and injunctive relief is decreed, the class action becomes a series of individual requests for appropriate individual relief. The potential conflict that was of concern in *General Telephone Co.* is that between classes of persons whose claim is not a common one (such as a class alleging race discrimination and a class alleging sex discrimination), rather than competition among persons complaining of various manifestations of a common claim.

[18] The original complaint did not explicitly raise claims of discrimination in hiring. R. 1-5. The claim was raised when respondent moved for class certification based on the "across the board" theory (R. 49). The initial certification order was entered without a hearing (R. 52).

to limit the class action to the employer's Irving, Texas, division where Falcon worked because, as the district court held, each division made its own hiring decisions (Pet. App. 15a). However, the district court never found that the employer had an express policy of company-wide discrimination.[19] Neither did it find that both the hiring and promotion practices at issue were the product of a single decision-maker. It never found a relationship between the treatment of applicants and of employees. In fact, while the record, and the findings, quite explicitly detail the promotion procedures of which Falcon complained, the record does not explain the hiring criteria, or fully indicate the hiring practices, alleged to be discriminatory.[20] Accordingly, there is no basis on which to hold that discrimination in promotion would raise inferences that the hiring process is also discriminatory, or that all actions here are part of a central policy of discrimination.[21]

We, therefore, submit that the existing record, established in reliance on the "across the board" rule, does not support the court of appeals' approval of the

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[19] In fact, the court found that there was no broad policy of discrimination against Hispanics in petitioner's promotion decisions (Pet. App. 40a).

[20] In its opinion at the remedial stage of the hearing (Pet. App. 55a), the district court noted that applicants for employment were not informed about available positions, and were not told that their applications were considered inactive after 90 days. The court found that both practices "exacerbated the extant discriminatory practices" of petitioner.

[21] Indeed, the fact that the district court concluded that Falcon, but not the class, had been discriminated against in promotions, while the class, but not Falcon, had been discriminated against in hiring, suggests the opposite conclusion.

class certification. The lower courts will be reconsidering the facts in any event. If, as we suggest, this Court disapproves the use of the "across the board" theory to weaken the requirements of Rule 23, it would be appropriate to vacate the decision of the court of appeals and remand to permit the parties to re-address the class issue under correct legal standards.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated, and the case remanded for reconsideration of the class certification under an appropriate standard.

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